



Migration Amendment (Protection of Identifying Information) Bill 2009

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Migration Amendment (Protection of Identifying Information) Bill 2009

Date introduced: 27 May 2009

House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: On Proclamation or 6 months after Royal Assent, whichever is the earlier.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill's main purpose is to amend the *Migration Act 1958* to ensure that all personal identity information obtained by the Department of Immigration and Citizenship (the Department) is subject to the access, use and disclosure regime in Part 4A of the Act.

Background

The amendments in the Bill are related to the enactment of the *Migration Legislation Amendment (Identification and Authentication) Act 2004* (the 2004 Act). The operative provisions of that Act amended the Migration Act and came into force in August 2004. The 2004 Act was significant for providing for the collection of biometric data by immigration officials. In particular, the Act strengthened the powers of government officials to collect 'personal identifiers' (signatures, photographs, height and weight measurements, fingerprints, iris scans, audio or video recordings etc) under the Migration Act in respect of non-citizens in certain situations. These situations might include routine circumstances – such as when a person is applying for an Australian visa or going through immigration clearance – or circumstances when the person is suspected of being an unlawful non-citizen. The amended Migration Act in Part 4A contained various restrictions on accessing and disclosing such personal identifiers except where expressly permitted. Contravention of these restrictions constituted criminal offences carrying significant penalties, including up to two years imprisonment.

The *Migration Legislation Amendment (Information and Other Measures) Act 2007* (the 2007 Act) made further amendments in this new regime in order to broaden the circumstances in which certain personal identifying information may be lawfully accessed

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or disclosed. Of specific relevance to this Bill, the 2007 Act amended two definitions in Part 4A, specifically the terms ‘disclose’ and ‘identifying information’, the effect being to narrow the range of circumstances where disclosure of personal identifiers may be an offence.

The Minister’s second reading speech to the Bill states that since 2007 it has come to the Department’s attention that these 2007 amendments are more limited than the original policy intention and that legal advice suggests that some personal identifiers collected by the Department are not protected by the Part 4A access, use and disclosure regime. These include personal identifiers collected from:

- other agencies (both domestic and international)
- unsolicited external sources, and
- law enforcement agencies (often shared with the department as part of an investigation).¹

The Explanatory Memorandum further comments:

As there are criminal penalties associated with the unauthorised disclosure, modification, impairment or failure to destroy identifying information as soon as required in Part 4A of the Act, rectification of the definition [ie ‘identifying information’] is required as soon as possible.²

The Bill effectively removes the 2007 amendments made to the terms ‘disclose’ and ‘identifying information’— its effect being to subject all personal identifiers collected by the Department for immigration purposes to the same statutory regime in Part 4A of the Act.

As an aside, it is of note that the Department, like all Commonwealth agencies, must also comply with the Information Privacy Principles contained in the *Privacy Act 1988* when dealing with personal information. However, in contrast to Part 4A of the Migration Act, under the Privacy Act, there are no criminal offences for contravention of those privacy principles.

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1. L Ferguson (Parliamentary Secretary for Multicultural Affairs and Settlement Services), ‘Second reading speech: Migration Amendment (Protection of Identifying Information) Bill 2009, House of Representatives, *Debates*, 27 May 2009, p. 10, viewed 2 June 2009, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-05-27/0041/hansard_frag.pdf;fileType=application%2Fpdf
 2. Explanatory Memorandum, Migration Amendment (Protection of Identifying Information) Bill 2009, p. 2.

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Financial implications

The amendments in the Bill will have no financial impact.³

Main provisions

Part 4A of the Migration Act—the terms ‘disclose’ ‘identifying information’ and ‘personal identifiers’

Part 4A of the Migration Act sets out the obligations relating to access and disclosure of personal identifier information under the Act. Central to the access and disclosure regime is the definition of ‘identifying information’ contained in section 336A. Amongst other things ‘identifying information’ means any personal identifier provided under sections 40, 46, 166, 170, 175, 188, 192 or 261AA of the Act.⁴ The effect of the existing definition of identifying information is that the offence provisions in Part 4A only apply where the identifying information was a personal identifier provided under the specific provisions listed above.

A ‘personal identifier’ is defined in section 5A of the Act to include fingerprints or 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 record of a person’s face, an iris scan, a person’s signature or certain other identifiers prescribed by the regulations. The purposes for collecting personal identifiers are set out in subsection 5A(3) and range from the very specific—to detect forum shopping by applicants for visas, to the more general. For example:

- to assist in the identification, in the present or future, of any non-citizen required to provide identifying information
- to improve the procedures for determining visa applications, and
- to enhance the Department’s ability to identify non-citizens who have a criminal history, who are of character concern or who are of national security concern.

Item 2 amends the definition of ‘identifying information’ in section 336A as described above. It deletes from paragraph (a) ‘provided under section 40, 46, 166, 170, 175, 188, 192 or 261AA’ and substitutes ‘obtained by the Department for one or more of the purposes referred to in subsection 5A(3)’.

3. Explanatory Memorandum, p. 2.

4. Section 40 sets out general rules for the granting of visas; section 46 deals with valid visa applications; section 166 deals with the identity requirements for persons entering Australia; section 170 deals with the identity requirements of persons on overseas vessels; section 188 deals with identity requirements relating to non-citizens; section 192 deals with detention of visa holders whose visas are liable to cancellation; and section 261AA provides that non-citizens in immigration detention must provide identity information.

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The effect of **item 2** is to expand the definition of identifying information to include any ‘personal identifier’ obtained by the Department for immigration purposes.

Item 1 proposes a similar and related amendment. It would amend the definition of ‘disclose’ in section 336A removing references to sections 40, 46, 166, 170, 175, 188, 192 or 261AA of the Migration Act and linking the definition of ‘disclose’ to the definition of ‘identifying information’. The effect is to make the terms ‘disclose’ and ‘identifying information’ consistent for the purposes of Part 4A.

The combined effect of items 1 and 2 is to broaden the range of circumstances where disclosure of personal identifiers may be an offence so that all personal identifiers collected by the Department for immigration purposes are subject to the same statutory regime in Part 4A of the Act.

Other amendments—Disclosure of personal identifiers under sections 336FA and 336FB.

Items 3 to 5 propose amendments to sections 336FA and 336FB. These sections authorise disclosure of certain personal identifiers for the purpose of obtaining an individual’s help to identify, authenticate the identity of, or locate, a subject. Disclosure is subject to certain conditions and limitations.⁵ The amendments in **items 3** and **5** would provide a further condition, namely that, for a disclosure of information to be authorised for these purposes, the information must only be disclosed to the extent necessary in order to obtain an individual’s help.

Concluding comments

The Bill is short but not insignificant. Its main provisions reverse a drafting change made in 2007 that effectively placed some personal identity information obtained by the Department outside the Part 4A obligations regarding the use and disclosure of personal identifiers.

5. For example, the immigration officer must be satisfied that it is reasonably necessary to make the disclosure to the individual in order to obtain that help.

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