The Senate

Legal and Constitutional Legislation Committee

Provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003

September 2003

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The Committee's conclusion

The Committee considers that issues such as identity and document fraud, forum shopping, strong border security and enhanced proof of identity are significant issues that must be addressed as part of a whole-of-government approach.

The Committee also agrees with several submissions that much of what is contained in the Bill is based on acceptable principles which strike a balance between individual rights and privacy considerations and the need for effective identification testing measures in the immigration context.

The Committee's underlying concerns are not with what is in the Bill but with what is not in the Bill and specifically with the extensive reliance in the Bill on the regulation-making power.

Recommendation 1

The Committee recommends that the Migration Legislation Amendment (Identification and Authentication) Bill 2003 be amended to include the circumstances in which non-citizens must provide personal identifiers and the types of identifiers required.

Recommendation 2

The Committee recommends that, based on evidence that the Eurodac system achieves a more appropriate balance between individual rights, privacy considerations and identification testing measures, the Bill be amended so that the storage, security, retention and destruction procedures of the Eurodac system provide the framework for the legislative regime in relation to all personal identifiers.

Recommendation 3

The Committee recommends that the Bill be amended to include specific arrangements for the retention, use and destruction of video recordings of identification tests as provided for in proposed section 261AJ, particularly as they may contain recordings of identification tests obtained by the use of reasonable force.

Recommendation 4

The Committee recommends that the Bill be amended to include provision for a review of its operations after two years.

Recommendation 5

The Committee recommends that Item 16 be amended to clarify that it is not intended to prevent persons, including persons who arrive in Australia without evidence of identity, from applying for a Protection Visa.

Recommendation 6

The Committee recommends that proposed subsection 336K(4) be amended to avoid any doubt that samples will be destroyed.

Recommendation 7

Subject to the preceding recommendations, the Committee recommends that the Bill be agreed to.

ABBREVIATIONS

DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DFAT	Department of Foreign Affairs and Trade
ICCPR	International Covenant on Civil and Political Rights
IPP	Information Privacy Principle
MOU	Memorandum of Understanding
OFPC	Office of the Federal Privacy Commissioner
PIAC	Public Interest Advocacy Centre
PV	Protection Visa
RDA	Records Disposal Authority
UNHCR	United Nations High Commissioner for Refugees

Chapter 1

Introduction

Background

1.1 On 20 August 2003, the Selection of Bills Committee recommended and the Senate agreed to refer the provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003 to the Legal and Constitutional Legislation Committee for inquiry and report by 11 September 2003. On 11 September, the Senate agreed to extend the time for the presentation of the report to 18 September 2003.

Purpose of the Bill

1.2 The Bill amends the *Migration Act 1958* to strengthen and clarify existing statutory powers to identify non-citizens.

Reasons for referral of the Bill

1.3 In recommending that the Bill be referred to the Legal and Constitutional Legislation Committee, the Selection of Bills Committee noted the following reason for referral:

> To examine the rationale in the provisions of the bill which gives the Minister extra powers in relation to citizenship identification and the use of biometric information and the effect of these powers on individual rights and liberties if the bill is implemented in its current form.

Submissions

1.4 The Committee advertised its inquiry in *The Australian* newspaper on Wednesday 27 August 2003. It also wrote to 62 individuals and organisations including the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). The Committee received six submissions (including one supplementary submission) as well as answers to questions on notice from DIMIA and a list of these appears at Appendix 1.

Hearing and evidence

1.5 The Committee held one public hearing on this inquiry on 8 September 2003 at Parliament House, Canberra. Witnesses who appeared before the Committee at the hearing are listed at Appendix 2. A copy of the Committee transcript is tabled for the information of Senators and it is also available through the Internet at http://aph.gov.au/Hansard.

Acknowledgment

1.6 The Committee is grateful to, and wishes to thank, all those who assisted with its inquiry.

Chapter 2

Provisions of the Bill

The Bill

2.1 The purpose of the Bill is to strengthen and clarify existing statutory powers to identify non-citizens. The Bill provides a framework for authorised officers to carry out identification tests in order to obtain personal identifiers.

2.2 Personal identifiers include:

- fingerprints or handprints;
- height and weight;
- photographs or other images of face and shoulders;
- audio or video recordings of a person;
- iris scans;
- signatures; and
- any other identifiers prescribed by regulation other than one involving an intimate forensic procedure.

2.3 The Bill lists several specific purposes of obtaining personal identifiers including:

- to identify, and authenticate the identity of, any non-citizen now or in the future;
- to improve the integrity of entry programs;
- to improve procedures for determining visa applications;
- to identify non-citizens who have a criminal history, who are a "character of concern" or who are of national security concern;
- to combat document and identity fraud; and
- to detect forum shopping.

2.4 As well as defining a personal identifier, the Bill sets out a number of circumstances in which a personal identifier may be required, how it is to be provided, stored, used and the circumstances in which it may be destroyed.

2.5 The Bill sets out general rules an authorised officer must follow when carrying out an identification test on a non-citizen. The Bill also sets out circumstances in which non-citizens may be required to supply personal identifiers, including:

- when applying for visas;
- when entering Australia at immigration clearance;
- when travelling or appear to be intending to travel on an overseas vessel from a point to another point;
- when departing Australia;
- when suspected of being an unlawful non-citizen; and
- when in immigration detention.

2.6 The Bill provides that the Minister will prescribe by regulation the precise circumstances in which a personal identifier must be supplied.

2.7 In his second reading speech the Hon Philip Ruddock MP, Minister for Immigration and Multicultural and Indigenous Affairs, stated that the Bill will implement a more comprehensive and transparent legislative framework for requiring certain non-citizens to provide personal identifiers such as photographs and signatures.[1] The Minister told the House of Representatives that the Bill will clarify and enhance the Government's ability to accurately identify and authenticate the identity of non-citizens at key points in the immigration process. At the same time it will provide protection for non-citizens who are required to provide their personal identifiers.[2]

2.8 In relation to proposed regulations, the Minister noted that allowing new types of personal identifiers to be described in the regulations "will permit the adoption of new technologies in a rapidly developing environment … it will also allow the Government to respond to new risks and concerns as they arise".[3]

2.9 The Bill elevates several features of the current administrative regime for the collection of personal identifiers from non-citizens into primary legislation.

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1 *Hansard*, House of Representatives, 26 June 2003, p. 17620.

2 ibid.

3 ibid.

Chapter 3

Major Issues

3.1 The Committee received evidence on the following four major issues in relation to the Bill:

- the need for legislation;
- compliance with international obligations;
- regulation-making powers; and
- storage, security, retention and destruction of identifying information.

The need for the legislation

3.2 The Public Interest Advocacy Centre (PIAC) registered its strong concern that there has been a failure on behalf of the government to articulate a compelling need for this legislation. According to PIAC, it is essential that this is done as the Bill abrogates fundamental individual rights and "will not be effective in preventing the evil complained of".[1]

3.3 PIAC acknowledged that it is important to have measures in place to accurately identify people who come and seek to remain in Australia, but maintained that the main purposes of the Bill appear to be based on two untested assumptions, namely, that identity fraud is being committed by non-citizens; and that the information proposed to be collected could be compared with data in other countries.[2]

3.4 In response to questions on the need for the Bill, DIMIA stated:

> The department is very conscious that it plays a significant gateway role in establishing the identity of noncitizens seeking to enter Australia. It is also conscious that many levels of government and the private sector rely on identity in their dealings with the public and that individuals suffer from identity fraud. This is at a time when there is growing concern over identity fraud and there are significant moves internationally to combat it. We know that the cost to the Australian community of identity fraud is measured in billions, not millions. We know that identity fraud systematically tests our programs. It is clear that the Migration Act currently provides for the collection of a substantial range of biometric identifiers. It is also clear that we have not fully drawn down on these provisions. However, the Migration Act as it stands does not adequately deal with the collection of biometrics. Its powers are inconsistent. It does not explicitly contain protections around

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1 PIAC, *Submission 2*, p. 1.

2 PIAC, *Submission 2,* p. 2.

> the use of identifiers or their disclosure. It does not allow for the use of technologies to facilitate processing at the border, such as facial recognition, nor does it provide for the use of other biometric images that other countries may include in their passports, such as iris scans or fingerprints. The Bill accordingly seeks to provide an overarching architecture for the collection and use of biometric identifiers and define what personal identifiers can be collected from noncitizens.[3]

Committee's view

3.5 The Committee considers that issues such as identity and document fraud, forum shopping, strong border security and enhanced proof of identity are significant issues that must be addressed as part of a whole-of-government approach.

3.6 The Committee also agrees with several submissions that much of what is contained in the Bill is based on acceptable principles which strike a balance between individual rights and privacy considerations and the need for effective identification testing measures in the immigration context.

3.7 The Committee's underlying concerns are not with what is in the Bill but with what is not in the Bill and specifically with the extensive reliance in the Bill on the regulation-making power.

Compliance with international obligations

3.8 Australia is a party to the International Covenant on Civil and Political Rights (ICCPR) and is obliged to ensure that individuals are not subjected to "… arbitrary or unlawful interference with … privacy".[4]

3.9 General Comment 16, adopted by the Human Rights Committee established to oversee the implementation of the treaty by parties, recognises that "as all persons live in society, the protection of privacy is a relative matter". Therefore it follows that not all interferences with privacy will breach the ICCPR, but they will do so where the curtailment of the right is unreasonable, or not objectively justifiable on a case-by-case basis.[5]

3.10 PIAC advised the Committee of their view that the Bill as currently drafted breaches this international obligation. Mr Simon Moran, Principal Solicitor, PIAC, maintained that there is a lack of clear evidence as to the extent of identity fraud on the part of asylum seekers in Australia, and it is unclear as to whether the information collected will be able to be compared with records overseas. In these circumstances, PIAC expressed its view that the interference provided for by the Bill is not justifiable

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3 *Committee transcript*, 8 September 2003, p. 10.

4 Article 17, *International Covenant on Civil and Political Rights*, 1996.

5 PIAC, *Submission 2*, p. 3.

or reasonable in the circumstances, and therefore does not comply with the right to privacy enshrined in the ICCPR.[6]

Regulation-making power

3.11 The Bill provides that the Minister must prescribe circumstances in which personal identifiers of non-citizens are to be used and may prescribe exemptions. The Minister may also prescribe further types of biometric measurements that are to be used. A number of the proposed new sections set out, in general terms, situations in which a person may be required to supply such personal identifiers "if prescribed circumstances exist".[7]

3.12 The Minister's second reading speech recognised that the regulations prescribing the situation in which non-citizens must provide personal identifiers, and the types of identifiers required, will largely mirror the current situations in which proof of identity to determine lawful status is required in the migration context.[8]

3.13 Several submissions expressed concern that, although regulations may largely reflect current arrangements, the measures in the Bill will nevertheless permit significant changes in scope and intrusiveness of procedures by regulation.

3.14 PIAC, for example, noted that the application of the regulations under the Bill "is potentially extremely broad" and is inconsistent with the Human Rights Committee's General Comment that legislation interfering with the right to privacy must specify in detail the precise circumstances in which such interference may be permitted.[9]

3.15 PIAC also drew attention to the Administrative Review Council report on *Rulemaking by Commonwealth Agencies* in which it recommends that measures which have a significant impact on individual rights and liberties should be enacted in primary legislation and not by way of regulation.[10]

3.16 The Victorian Bar expressed concern about the "unfettered discretions" conferred on the Minister and concluded that these matters should be dealt with "by Statute and is a matter for Parliament not Ministerial prerogative".[11]

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6 PIAC, *Committee transcript*, 8 September 2003, p. 3.

7 See Items 13, 17, 20, 22, 24, 28, and 32 of Schedule 1.

8 *Hansard*, House of Representatives, 26 June 2003, p. 17620.

9 PIAC, *Submission 2*, p. 4.

10 ibid.

11 Victorian Bar, *Submission 4*, p. 2.

Committee's view

3.17 The Committee shares the concerns of witnesses to this inquiry about the use the regulation-making power.

3.18 This should come as no surprise as it is a view that the Committee has rigorously maintained over recent years. For example, in its recent report, *Provisions of the Migration Amendment (Sponsorship Measures) Bill 2003*, the Committee made the following recommendation:

> Because of the broad regulatory framework established by this Bill, the Committee recommends that the Senate ensure that future regulations made under these provisions are scrutinised most carefully, in order to ensure that more onerous sponsorship obligations are not imposed without adequate justification and consultation, particularly in relation to family stream visitors, and that appropriate decisions are prescribed as reviewable by the Migration Review Tribunal.

3.19 In this recommendation, the Committee made it clear that it has broad and ongoing concerns about the amount of material intended to be brought forward through regulations by DIMIA.

3.20 Again, in relation to Migration Legislation Amendment (Identification and Authentication) Bill 2003, the Committee finds itself required to consider and adjudicate on civil and human rights issues that are not contained in primary legislation but are to be prescribed in regulations. In this instance, the Committee considers it would be inappropriate for such significant issues to be addressed by way of regulation. The Committee's view is that these matters should be addressed in primary legislation. In reaching this conclusion, the Committee notes similar concerns expressed by the Scrutiny of Bills Committee.[12]

Recommendation 1

The Committee recommends that the Migration Legislation Amendment (Identification and Authentication) Bill 2003 be amended to include the circumstances in which non-citizens must provide personal identifiers and the types of identifiers required.

Storage, security, retention and destruction of identifying information

3.21 The Bill sets out storage, security retention and destruction requirements for the information collected. Several submissions were critical of the Bill in relation to these matters and in so doing referred the Committee to Eurodac, an automated

12 Senate Scrutiny of Bills Committee, *Alert Digest No.9 of 2003*, p. 7.

fingerprint identification system introduced recently into the European Union. Mr John Gibson from the Victorian Bar summarised these views in the following terms:

> …the bill itself also raises serious issues relating to collection, storage, use and destruction of identifying information, and we submit that this is not adequately provided for in the bill. There is no reference to standards and mechanisms by which identities will be checked and comparisons made; it is quite clear from the appropriate section that the intent is to match data in order to ascertain identities through personal identifiers. The Eurodac system, which is in operation in the European community in relation to the operation of the Dublin convention, contains a whole series of mechanisms and provisions to this end.[13]

3.22 The Federal Privacy Commissioner also drew attention to the "new, lesser standard governing data retention" to personal identifiers covered by the Bill.[14]

3.23 The consensus of evidence on this issue seemed to be that the Eurodac arrangements for storage, security, retention and destruction of identifying information are superior to those contained in the Bill.[15] In commending Eurodac to the Committee, submissions indicated that the Bill should contain a time limit for the destruction of all information.[16] The Eurodac system only collects anonymous fingerprints, and all samples are destroyed after 10 years, or upon a grant of citizenship. PIAC considers this might be an appropriate precedent for Australia to follow.[17]

3.24 In relation to the comparative merits of Eurodac and the Bill, Ms Janet Haughton, Assistant Secretary, Identity Fraud and Biometrics Branch, DIMIA, responded in the following terms:

> Essentially Eurodac is just a mechanism to help them determine which of the member states is the one that should be responsible for processing an asylum claim. It matches fingerprints against the centralised and automated database. So it will ask, 'Has someone else already seen this fingerprint in another country?' If that is the case then in fact it becomes that first country's responsibility to process the person. So the reasons for setting up Eurodac are much narrower than the general collection of personal identifiers[18].

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13 *Committee transcript*, 8 September 2003, Victorian Bar, p. 3.

14 Federal Privacy Commissioner, *Submission 3*, p. 4.

15 PIAC, *Submission 2*, p. 5; Victorian Bar, *Submission* 4, p. 5; Federal Privacy Commissioner, *Submission 3*, pp. 3-4.

16 PIAC, *Submission 2*, p. 5.

17 PIAC, *Submission 2*, p. 5.

18 *Committee transcript,* 8 September 2003, DIMIA, p. 20.

3.25 Ms Haughton assured the Committee that the requirements of Australia's privacy legislation are consistent with European Union privacy principles[19].

Committee's view

3.26 Notwithstanding departmental assurances, the Committee notes consistent evidence during the inquiry that storage, security, retention and destruction arrangements contained in Eurodac are preferable to those contained in the Bill. The Committee considers that Eurodac has procedures that will improve the Bill.

Recommendation 2

The Committee recommends that, based on evidence that the Eurodac system achieves a more appropriate balance between individual rights, privacy considerations and identification testing measures, the Bill be amended so that the storage, security, retention and destruction procedures of the Eurodac system provide the framework for the legislative regime in relation to all personal identifiers.

19 *Committee transcript,* 8 September 2003, DIMIA, p. 20.

Chapter 4

Other Issues

Background

4.1 The six submissions lodged with the Committee raised many issues and it was impossible to test all of them with the department at the public hearing. The Committee requested that the department provide answers on the following issues:

- video recording of identification tests;
- whole-of-government approach;
- testing of non-citizens who become citizens;
- further accountability mechanisms and safeguards;
- disclosure of information to foreign governments;
- failed asylum seekers;
- fingerprinting;
- retention of identifying information;
- disclosure and exceptional circumstances;
- the Bill and protection visas;
- use of reasonable force;
- definition of "destroyed";
- other definitions;
  - "independent person";
  - "authorised officer";
  - "character concern";
  - 'meaningful identifier";
- authorising an identification test;
- identification tests;
- personal access to information;
- care and counselling before and after testing; and
- scientific reliability of tests.

4.2 In this Chapter, the Committee considers these issues and the responses provided by DIMIA.

Whole-of-government approach

4.3 In its submission, the Office of the Federal Privacy Commissioner suggested that it was unclear how the Bill will mesh with emerging thinking by other areas of government on authentication, identification, identification identity fraud and privacy.[1] During the public hearing, members of the Committee also questioned officers about the whole-of-government approach to these issues.[2] In its response the department advised:

> There is significant current focus at the whole-of-government level on identity fraud issues, including the possible use of biometric technology.
>
> Senator Ellison's Media Release of 6 July 2003 announced a range of Commonwealth whole-of-government initiatives to reduce the incidence of fraud and financial crime and provide enhanced security and safety for Australian residents. The Media Release also refers to the "SmartGate" trial by Customs and complementary work by DFAT on considering the addition of a biometric identifier in the next Australian passport series.
>
> The Bill will complement this work by strengthening DIMIA's identification processes. As many other agencies rely on identity information collected by DIMIA these amendments will enhance the verification and checking procedures of those agencies.[3]

4.4 In response to the Federal Privacy Commissioner's suggestion that the Bill would be a "good candidate for a Privacy Impact Assessment", the department responded that "this has never previously been suggested to DIMIA during prior consultations with OFPC. However, DIMIA would consider this option".[4]

Video recording of identification tests

4.5 Proposed section 261AJ permits an authorised officer to video record the carrying out of an identification test. Under proposed paragraph 5A(1)(d), a video recording made under section 261AJ is not a personal identifier under the meaning proposed in the Bill. The Committee questioned officers of DIMIA about arrangements for storage, access and disposal of these video recordings as it appeared that the matter is not addressed in the Bill.

4.6 DIMIA responded:

> I understand the concern. It is not one that had occurred to us, simply because that provision was inserted to provide protection around the way in

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1 Federal Privacy Commissioner, *Submission 3*, p. 1.

2 *Committee transcript*, 8 September 2003, DIMIA, p. 16.

3 DIMIA, *Answers to questions on notice*, Attachment B, p. 2.

4 ibid.

> which it was taken to the individual. In other words, it was basically there to validate the process or whatever, rather than as a recording in itself.[5]

4.7 DIMIA officers confirmed that the video recordings are subject to normal storage and disposal arrangements contained in the *Archives Act 1983*. The officers also confirmed that these video recordings could be taken in circumstances where reasonable force is used to obtain a personal identifier.[6]

4.8 Specifically, the department advised that the *Archives Act 1983* governs the retention of a video recording under proposed section 261AJ of the Bill. A video recording is a Commonwealth record for the purpose of section 3 of that Act, which defines "record" to mean

> a document … that is, or has been, kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connections with any event, person, circumstance or thing.

4.9 A document is defined by the *Acts Interpretation Act 1901* to include any article or material from which sounds, images or writings are capable of being reproduced.[7] The department noted that the Archives Act does not set out retention periods for Commonwealth records. However, section 24 of the Archives Act deals with disposal or destruction of Commonwealth records. In effect, section 24 provides that before a Commonwealth record can be destroyed, the authority of the National Archives of Australia is required. There are certain exceptions to the general rule under section 24. For example, subsection 24(2) provides that if it is obvious that no valuable information will be lost if records are destroyed, then agencies may dispose of records without formal authorisation in accordance with "normal administrative practice". Other exceptions include circumstances where a record is destroyed as required by another law, or where the National Archives have given permission for the record to be destroyed.[8]

Committee's view

4.10 The Committee notes the advice from DIMIA that the retention of a video recording under proposed section 261AJ of the Bill is governed by the *Archives Act 1983*. Nevertheless, the Committee is concerned about the retention, use and destruction of these videos, particularly as they may be taken when reasonable force is being used to carry out an identification test. In the circumstances, the Committee considers that more specific arrangements need to be included in the Bill.

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5 *Committee transcript*, 8 September 2003, DIMIA, p. 22.

6 ibid.

7 DIMIA, *Answers to questions on notice*, Attachment A, p. 1.

8 ibid.

Recommendation 3

The Committee recommends that the Bill be amended to include specific arrangements for the retention, use and destruction of video recordings of identification tests as provided for in proposed section 261AJ, particularly as they may contain recordings of identification tests obtained by the use of reasonable force.

Non-citizens who become citizens

4.11 Mr Chris Levingston,[9] the Victorian Bar[10] and the Federal Privacy Commissioner[11] raised concerns about the application of the Bill's provisions to a citizen whose identity information was collected at a time when he or she was a non-citizen. The department responded to this matter in the following terms:

> [Proposed paragraph] 336K(1)(c) provides that personal identifiers and other identifying information collected under the Bill will generally be retained according to the *Archives Act 1983* (ie according to DIMIA's corresponding Records Disposal Authority (RDA)). This is the case currently for information collected from DIMIA clients who ultimately become citizens. For example, approved migration applications are retained as national archives. The Bill also provides for indefinite retention of personal identifiers and other identifying information of some non-citizens who have, by virtue of their previous actions, already posed particular risks to the integrity of DIMIA programs (336L) … The period of retention of identifying information relating to a person, where the person was a non-citizen at the time the information was collected but has since become a citizen, will be determined according to whether the provisions of 336K or 336L apply, that is, consistent with the current retention requirements. For those cases where 336L applies, it is important to retain personal identifiers in the event that fraud is discovered and citizenship needs to be revoked. DIMIA has evidence that such fraud has been perpetrated in this caseload.[12]

Further accountability mechanisms and safeguards

4.12 Several submissions proposed a number of accountability mechanisms and further safeguards that should be incorporated into the Bill. These included:

(a) a legislative requirement to review the operation of the Bill after two years;

(b) other review mechanisms; and

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9 Mr Christopher Levingston, *Submission 1,* p. 3.

10 Victorian Bar, *Submission 4*, p. 4.

11 Federal Privacy Commissioner, *Submission 3*, p. 5.

12 DIMIA, *Answers to questions on notice*, Attachment B, p. 2.

(c) appropriate oversight of privacy arrangements[13].

4.13 DIMIA provided the Committee with the following response to these specific proposals:

> (a) DIMIA already has many of the powers set out in the Bill – the Bill adds specificity to collection of personal identifiers and provides safeguards for individuals. Separate review mechanisms are not appropriate or necessary given the various monitoring and complaint mechanisms in place, for example the Ombudsman, the Courts, Parliamentary scrutiny.
>
> (b) The proposed provisions in the Bill would be subject to regular and systematic internal audit, such as a review of the proposed measures to identify operational successes as well as unintended or undesirable consequences. It is envisaged that such audits will also encompass the operation of the personal identifier database. DIMIA will also consult with the OFPC on any proposals to develop and implement the database. The Federal Privacy Commissioner will undertake his functions including handling any potential future complaints in regards to the proposed measures.
>
> (c) The proposed measures are balanced against an individual's right to privacy and DIMIA's obligations under the Privacy Act. The impact on an individual's privacy must be viewed in the context of the Government's need to quickly and accurately identify those who seek to enter and remain in Australia and access government benefits and entitlements. It is also important to assess the risk that persons of security or character concern can enter Australia using false identities. The Bill has included legislative safeguards, particularly with respect to privacy, including:
>
> - The purposes for which personal identifiers can be collected, used and disclosed;
> - defining conditions for collection, access, disclosure, retention, destruction of personal identifiers and other identifying information collected from detainees; and
> - special provisions for minors and incapable persons.
>
> Given the non-invasive nature of procedures such as photographing or fingerprinting, and the many safeguards ensuring that the information will not be accessed or disclosed for other purposes than those clearly stated in the legislation, it is submitted that this interference is limited and justified. It is important to recognise that the use of personal identifiers is privacy enhancing and will allow the government to ensure that an individual's identity is protected against imposters and misrepresentation.

13 Federal Privacy Commissioner, *Submission 3*, p. 2; UNHCR, *Submission 6*, p. 2; Victorian Bar, *Submission 4*, p. 1.

Committee's view

4.14 The Committee notes the advice and assurances of DIMIA that there is no need for further accountability mechanisms and safeguards. However, in light of the considerable concerns about the scope and extent of the regulation-making power in the Bill, it considers that a legislative requirement to review the operation of the Bill after two years is appropriate, at a minimum.

Recommendation 4

The Committee recommends that the Bill be amended to include provision for a review of its operations after two years.

Disclosure to foreign governments

4.15 Most submissions, including those from the Federal Privacy Commissioner[14] and the United Nations High Commissioner for Refugees,[15] raised four significant issues relating to disclosure of personal identifiers to foreign governments.

4.16 First, they were concerned that once personal information is transferred overseas, it is generally speaking beyond the power of Australian privacy law. As a consequence, an individual whose personal information is transferred overseas may lose significant privacy protections.[16]

4.17 Secondly, submissions were concerned that disclosure of personal information in cases where an individual had unsuccessfully applied for a protection visa under subsection 336F(5) may harm the interests of the unsuccessful applicant or that individual's family.[17]

4.18 Thirdly, the Federal Privacy Commissioner addressed the need for regulations concerning disclosure of personal information to foreign entities.[18]

4.19 Fourthly, the Federal Privacy Commissioner, PIAC[19] and the Victorian Bar[20] sought restrictions on the recipient's use and disclosure of identifying information.

4.20 In a detailed response on these matters DIMIA advised:

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14 Federal Privacy Commissioner, *Submission 3*, pp. 2-3.

15 UNHCR, *Submission 6*, p. 2.

16 Federal Privacy Commissioner, *Submission 3*, p. 2.

17 Federal Privacy Commissioner, *Submission 3*, p. 3; Victorian Bar, *Submission 4*, p. 4.

18 Federal Privacy Commissioner, *Submission 3*, p. 3.

19 PIAC, *Submission 2*, p. 5.

20 Victorian Bar, *Submission 4*, pp. 4-5.

Information Privacy Principle 11 (IPP 11) of the *Privacy Act 1988* provides for limits on the disclosure of personal information. IPP 11 applies to existing legislation and will apply equally to the proposed provisions in the Bill. The current practice for international data exchanges/checks is to request information through the Department of Foreign Affairs and Trade (DFAT) or DIMIA at embassies and High Commissions relying on local protocols. Information is collected on a needs and case-by-case basis. Additionally, personal identifier data exchanges would be managed through MOUs clearly outlining requirements relating to:

- the purpose for which the information is exchanged; and
- its use and disclosure by the recipient.

Additionally:

- the Bill prohibits disclosure to a foreign country if the person to whom the identifying information relates to is an applicant for a protection visa, or an offshore entry person who makes a claim for protection under the refugees convention, in relation to that country (336F(3));
- such disclosure may however take place if:

- the person to whom the identifying information relates has requested or agreed to return to the foreign country in respect of which the application is made;

- the person is an applicant for a protection visa and the application has been refused and finally determined; or

- the person is an offshore entry person who makes a claim for protection under the refugees convention as amended by the refugees protocol, and that person is found not to engage Australia's protection obligations.

- Persons to be tested will be informed of the various disclosure considerations under Information Privacy Principle 2, including to other countries and agencies.
- They will also be informed of their rights under the Privacy Act 1988, Freedom of Information Act 1982 and other relevant legislation.

The proposed provisions mirror currently existing processes. It is intended that the Bill adhere to the Information Privacy Principles contained in the *Privacy Act 1988*. DIMIA has a very strong history of protecting the personal privacy of all clients. Given the volume of personal information that it collects and stores, DIMIA has an exceptionally good record in relation to the protection of client privacy. … MOUs would be developed as appropriate for the exchange of such information and to ensure the protection of the individual. The provisions of the Bill however assist to improve Australia's ability to identify the person accurately in the situation

> where their application has been refused and arrangements are legitimately to be made for their departure from Australia.[21]

Failed asylum seekers

4.21 In the response set out in full above, the department notes that the Bill prohibits disclosure to a foreign country if the person to whom the identifying information relates to is an applicant for a protection visa, or an offshore entry person who makes a claim for protection under the refugees convention, in relation to that country as provided for in proposed new subsection 336F(3). Such disclosure may however take place if, for example, the person is an applicant for a protection visa and the application has been refused and finally determined.

4.22 The Victorian Bar emphasised that the disclosure of personal identifiers to a foreign government in the case of a failed asylum seeker should not be confined to situations where the case is finally determined, that is at the completion of merits review only. According to the Bar, this should only happen in the case of a failed asylum seeker whose application has been rejected, who has no judicial review rights or appeals outstanding and who has no other application to remain in Australia pending. Mr John Gibson, representing the Victorian Bar, commented on this issue in the following terms:

> Another important and objectionable component is section 336F relating to disclosure and disclosure to foreign governments, particularly in the context of asylum seekers. The provision is made for disclosure after the matter has been finally determined, which is defined in the act effectively as completion of merits review. It is our submission that there should be a statutory amendment to make it clear that an asylum seeker whose application has been rejected, who has no judicial review rights or appeals outstanding and has no other applications to remain in Australia, may have his or her information disclosed to a foreign government. There are serious concerns about the way the provision is currently drafted …[22]

Fingerprinting

4.23 It is clear that the Bill will remove some doubts about the taking of identifiers from immigration detainees as well as providing statutory procedural safeguards.[23]

4.24 However, the Federal Privacy Commissioner was concerned that current protections provided by the *Migration Act 1958* in relation to finger printing may be eroded by the Bill.[24] The current protections include fingerprinting as a last resort, the

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21 DIMIA, *Answers to questions on notice*, Attachment B, pp. 4-6.

22 Victorian Bar, *Committee transcript,* 8 September 2003, p. 4.

23 See Item 32.

24 Federal Privacy Commissioner, *Submission 3*, pp. 3-4.

prohibition on fingerprinting of minors and the obligation to destroy data on the grant of a visa or deportation will be removed.[25]

4.25 In response to this matter, DIMIA advised that it currently collects fingerprints from some persons with their consent. In relation to current policy guideline titled MSI 125, DIMIA indicated that:

- it relates only to the detention context;
- it mentions that reasonable force may be used where consent is not given, but does not codify related procedures;
- fingerprints must not be taken unless there is an intention to match them for the purposes of identification (policy only); and
- fingerprints must not generally be provided to the authorities in a country against which protection claims are made.

4.26 The department also advised that there is legal argument about whether current legislation provides clear power to collect fingerprints from non-citizens. In contrast, the Bill provides a clear legislative framework with respect to the collection of fingerprints and all other personal identifiers in the Bill.[26] The department reiterated evidence given during the public hearing that the Bill provides specific safeguards relating to the collection, use, access etc of fingerprints and other personal identifiers.[27]

Retention of identifying information

4.27 Submissions were critical of proposed section 336L whereby identifying information may be indefinitely retained,[28] and in particular where:

- an individual has been in immigration detention; and
- an individual is a threat to security.

4.28 In its response on this issue, DIMIA indicated at the outset that it already retains a wide range of information according to the Records Disposal Authority (RDA). Therefore, for all cases except those mentioned in proposed section 336L, the Bill builds on existing arrangements.[29]

4.29 According to the department, the Bill provides a clear framework for the collection of personal identifiers, for example facial images, fingerprinting, in a range

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25 Department of the Parliamentary Library, *Bills Digest No. 14, 2003-04*, p. 13.

26 DIMIA, *Answers to questions on notice*, Attachment B, pp. 6-7.

27 DIMIA, *Answers to questions on notice*, Attachment B, p. 7.

28 PIAC, *Submission 2,* p. 5; UNHCR, *Submission 6*, p. 5.

29 DIMIA, *Answers to questions on notice*, Attachment B, p. 7.

of circumstances as prescribed. The Bill also provides a framework for the collection, storage and use of this information providing specific safeguards for the individual.

4.30 The department concluded its response on this matter by advising that:

> it is in the public interest that we have the potential to retain indefinitely, data of persons of behaviour or security concern. For example, law enforcement agencies provide photographs of persons of security and character concern to DIMIA. This information could be stored in alert systems and used for checking purposes.[30]

Disclosure and exceptional circumstances

4.31 The Federal Privacy Commissioner sought clarification that information retained under the authorisation of the Archives Act pursuant to proposed paragraph 336K(1)(c) is only available for use or disclosure in exceptional circumstances, and consistent with the purpose of collection.[31]

4.32 In response, DIMIA advised that proposed section 336E provides that the disclosure of identifying information must be a "permitted disclosure". "Permitted disclosure" is defined at proposed paragraphs 336E(2)(a)-(i). However, proposed subsection 336E(3) sets out a limitation on what constitutes a "permitted disclosure". It provides that a disclosure is not a permitted disclosure if it is for the purpose of using a prescribed type of personal identifier in investigating, or prosecuting a person for, an offence against a law of the Commonwealth or a State or Territory.[32]

The Bill and protection visas

4.33 Mr John Gibson, representing the Victorian Bar, told the Committee that one of the Bar's most critical objections to the Bill relates to Item 16. This item inserts the following sections:

(2A) An application for a visa is invalid if:

(a) the applicant:

(i) if prescribed circumstances exist—has been required by an officer to provide one or more personal identifiers of the type or types prescribed in relation to the application; or

(ii) has been required by an officer to provide other evidence of identity in relation to the application; and

(b) the applicant has not complied with the requirement.

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30 DIMIA, *Answers to questions on notice*, Attachment B, pp. 7-8.

31 Federal Privacy Commissioner, *Submission 3*, p. 4.

32 DIMIA, *Answers to questions on notice*, Attachment B, p. 8.

> Note : An invalid application for a visa cannot give rise to an obligation under section 65 to grant a visa: see subsection 47(3).

(2B) The applicant is taken not to have complied with a requirement referred to in subparagraph (2A)(a)(i) unless the one or more personal identifiers are provided by way of one or more identification tests carried out by an authorised officer.

> Note: If the types of identification tests that the authorised officer may carry out are specified under section 5D, then each identification test must be of a type so specified.

(2C) However, subsection (2B) does not apply, in circumstances prescribed for the purposes of this subsection, if the personal identifier is of a prescribed type and the applicant:

> (a) provides a personal identifier otherwise than by way of an identification test carried out by an authorised officer; and
>
> (b) complies with any further requirements that are prescribed relating to the provision of the personal identifier.

4.34 Mr Gibson told the Committee that this is effectively an attempt to preclude consideration of asylum claims where there is an inability to produce evidence of identity.[33] He continued:

> We would submit that an attempt to deny a person who cannot produce evidence of identity access to a refugee determination process is simply wrong in principle. There are plenty of examples of people who are unable to obtain documentation in their country, given its lack of sophistication, who flee conditions of persecution in anonymous circumstances by design or who employ fraudulent documentation because they are fleeing persecution. While one would certainly qualify in situations where there is a deliberate attempt to mislead, as a matter of principle it is our submission that the inability to produce evidence of identity should not preclude consideration of claims.[34]

4.35 When questioned on this matter by members of the Committee, Ms Haughton provided the following clarification:

> There has also been a level of confusion surrounding the provision of documentary evidence to verify an identity in this Bill, which is just aiming to collect identity information from people. The fact that someone did not have any evidence of their identity but was claiming asylum is a different issue to what this Bill is aiming to address, which is that they would need to provide us with a personal identifier or agree to have their photograph or their fingerprints taken so that we can actually verify the information. The fact that someone does not have documents of identity is not the issue here;

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33 Victorian Bar, *Committee transcript*, 8 September 2003, p. 2.

34 ibid.

> it is really whether they are willing to provide a photograph to us so that we can verify their identity.[35]

4.36 In its answers to questions on notice, the department emphasized that the Bill does not aim to prevent persons, including persons who arrive in Australia without evidence of identity, from applying for a Protection Visa (PV). Lack of documentary evidence of identity does not preclude an applicant from making a valid application. Rather, the Bill aims to enable a personal identifier (for example, a photograph) to be collected from such a person at the time they lodge an application, for the purposes of establishing, and later authenticating, their identity. This is regarded as a reasonable requirement, especially given general difficulties in establishing the identity of PV applicants and given operational evidence about identity fraud in the PV caseload. The department added that regulations could be formulated to take into account appropriate circumstances where a prospective applicant for protection is unable to provide a personal identifier.[36]

4.37 In a supplementary submission to the Committee, Mr Gibson from the Victorian Bar expressed the view that the DIMIA explanations were "simply unsatisfactory" and that the Bill "would clearly have the effect of invalidating the applications of claimants who cannot produce evidence of their identity". He emphasised that any attempt to deny access to asylum determination by this device, either advertently or inadvertently, is wrong in principle and contrary to the purposes and spirit of the Refugees Convention. Subparagraph 46(2A)(a)(ii) should be removed from the Bill.[37]

Committee's view

4.38 Given the concerns and, according to the department, "confusion" about the scope of Item 16, the Committee considers that the item should be redrafted to avoid doubt about its intention.

Recommendation 5

The Committee recommends that Item 16 be amended to clarify that it is not intended to prevent persons, including persons who arrive in Australia without evidence of identity, from applying for a Protection Visa.

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35 DIMIA, *Committee transcript*, 8 September 2003, p. 13.

36 DIMIA, *Answers to questions on notice*, Attachment B, p. 8.

37 Victorian Bar, *Submission 4A*, p. 2.

Use of reasonable force

4.39 Submissions referred to provisions relating to the use of reasonable force and sought clarification on issues such as restraint and qualifications.[38] DIMIA's response on this important issue is reproduced in full:

> It is clear from the intention of the provisions that the use of reasonable force refers to the minimum force reasonably necessary for individual circumstances. Every detainee will be informed of certain matters before they undergo an identification test. Those matters will, in the context of immigration detention, include the authority to compel testing. Officers have a duty of care with respect to detainees, this means that officers are obliged to take all reasonable action to ensure that detainees do not suffer any physical harm or undue emotional distress while detained. An authorised officer who intends to use reasonable force under the proposed provisions must have regard to the following principles when deciding the level of force required:
>
> - it is a matter of judgement of the authorised officer conducting the identification test as to the level of force required in each particular situation but the level of force used must be objectively justifiable and reasonable; and
> - the amount of force used will not be reasonable unless it is proportionate to the amount of resistance offered by the person undergoing the identification test.
>
> The Bill also provides limitations on the use of reasonable force to conduct identification tests:
>
> - the non-citizen required to provide the personal identifier must be 18 years and over, and have refused to allow the test to be carried out;
> - the personal identifier to be collected is not a signature;
> - all reasonable measures to carry out the identification test without force have been exhausted; and
> - the use of force must be authorised by a senior authorising officer.
>
> Further, the use of force cannot be used on a minor or an incapable person.
>
> While use of force is permissible in certain circumstances, officers should be aware that the use of greater force than necessary to secure and restrain a detainee for the purposes of obtaining personal identifiers may amount to an assault. The principles of negotiation and conflict de-escalation will be always emphasised as alternatives to the use of force. It is envisaged that detailed policy guidelines on the use of reasonable force will be developed covering these and other related matters. It has been DIMIA's experience

38 Victorian Bar, *Submission 4*, p. 4.

> that in the overwhelming majority of cases in detention, individuals cooperate with requests to be photographed, precluding the need to use reasonable force.[39]

Definition of "destroy"

4.40 Proposed subsection 336K(4) provides that identifying information is "destroyed" if any means of identifying it with the person from whom it was taken or to whom it relates is destroyed.

4.41 Submissions expressed the view that this new section covers the destruction of identifying information but does not cover the sample itself.[40] The Federal Privacy Commissioner suggested that it would be useful to clarify whether the provision could result in samples being re-identified at a later time. The Commissioner gave as an example the sample or measurement taken in the process of collecting a fingerprint, iris scan etc, may be readily re-identified when matched with another, identified fingerprint or iris scan.[41]

4.42 DIMIA advised that proposed section 336A defines "identifying information" as "any personal identifier", "any meaningful identifier derived from any personal identifier" or "any record of a result of analysing any personal identifier or any meaningful identifier derived from any personal identifier" or "any other information, derived from any personal identifier, any meaningful identifier derived from any personal identifier or any record of a kind referred to above that could be used to discover a particular person's identity or to get information about a particular person".[42]

4.43 The department further advised that proposed subsection 336K(4) provides that "identifying information" is "destroyed" if any means of identifying it with the person from whom it was taken or to whom it relates, is destroyed, that is, it is de-identified. This is consistent with the definition provided in the *Crimes Act 1914*.[43]

Committee's view

4.44 Despite the department's assurances, the Committee is not convinced that proposed subsection 336K(4) would not prevent samples being re-identified. The Committee notes anonymous samples could still form the basis of an information database.

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39 DIMIA, *Answers to questions on notice*, Attachment B, pp. 11-12.

40 See Department of the Parliamentary Library, *Bills Digest No. 14, 2003-04*, p. 12.

41 Federal Privacy Commissioner, *Submission 3*, p. 4.

42 DIMIA, *Answers to questions on notice*, Attachment B, p. 8.

43 DIMIA, *Answers to questions on notice*, Attachment B, p. 9.

Recommendation 6

The Committee recommends that proposed subsection 336K(4) be amended to avoid any doubt that samples will be destroyed.

Other definitions

4.45 Submissions raised concerns about several definitions in the Bill and these are addressed below.

"Independent person"

4.46 The Victorian Bar suggested that the definition of "independent person" in section 5 be narrowed in the case of minors to a person who is a parent or guardian or person taking responsibility for the child.[44]

4.47 In response, the department advised that an "independent person" is defined in relation to minors as a person who is capable of representing the best interests of the minor, and is only required in the case of minors if the parent or guardian of the minor is not available (new sections 192A and 261AL). In such cases, an independent person is the person who is taking responsibility for the child.[45]

4.48 The department added that under section 6 of the *Immigration (Guardianship of Children) Act 1946*, the Minister is the guardian of an unaccompanied non-citizen child. To avoid a conflict of interest in such cases, the Bill provides that if the Minister is the minor's guardian, an independent person is required under sections 192A and 261AL. Under section 7, the Minister may place a non-citizen child in the custody of a "custodian".[46]

"Authorised officer"

4.49 The Victorian Bar questioned whether the definition of "authorised officer" could include employees of detention centre contractors.[47]

4.50 The department responded that such employees already carry out a range of activities as "authorised officers". The Bill simply builds on existing arrangements. The "authorised officer" status would, like all delegations, be highly targeted and not generally available.[48]

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44 Victorian Bar, *Submission 4*, p. 1.

45 DIMIA, *Answers to questions on notice*, Attachment B, p. 9.

46 ibid.

47 Victorian Bar, *Submission 4*, p. 2.

48 DIMIA, *Answers to questions on notice,* Attachment B, p. 9.

"Character concern"

4.51 Proposed section 5C deals with the meaning of character concern in the following terms:

5C Meaning of *character concern*

(1) For the purposes of this Act, a non-citizen is of ***character concern*** if:

(a) the non-citizen has a substantial criminal record (as defined by subsection (2)); or

(b) the non-citizen has or has had an association with someone else, or with a group or organisation, who is reasonably suspected of having been or being involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the non-citizen's past and present criminal conduct;

(ii) the non-citizen's past and present general conduct;

the non-citizen is not of good character; or

(d) in the event that the non-citizen were allowed to enter or to remain in Australia, there is a significant risk that the non-citizen would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

(2) For the purposes of subsection (1), a non-citizen has a ***substantial criminal record*** if:

(a) the non-citizen has been sentenced to death; or

(b) the non-citizen has been sentenced to imprisonment for life; or

(c) the non-citizen has been sentenced to a term of imprisonment of 12 months or more; or

(d) the non-citizen has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), and the total of those terms is 2 years or more; or

(e) the non-citizen has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

4.52 Mr Chris Levingston[49] and the Victorian Bar[50] raised several concerns with this definition including:

- proposed 5C - "the non-citizen has or has had an *association* with someone else, or with a group or organisation, who is reasonably suspected of having been or being involved in criminal conduct";
- proposed section 5C(1)(d) – "*significant risk*"; and
- proposed section 5C(1)(d)(v) – "a *danger* to the Australian community".

4.53 The department advised that as outlined in the Explanatory Memorandum, the definitions of "character concern" and "substantial criminal record" largely mirror the existing definitions of "character test" and "substantial criminal record" in subsections 501(6) and (7).

4.54 The department added that the definitions are not identical. Separate definitions of "character concern" and "substantial criminal record" have been inserted in proposed section 5C because section 501 only relates to refusal/cancellation of a visa on character grounds. The definitions in proposed section 5C will have a broader application in other than the refusal/cancellation context. One of the purposes of proposed subsection 5A(3) is to enhance the department's ability to identify non-citizens who are of character concern.[51]

"Meaningful identifier"

4.55 Proposed section 336A defines "identifying information" and at paragraphs (c) and (d) refers to "any meaningful identifier derived from any personal identifier". The Victorian Bar advised that the term is neither defined or explained in the Bill.[52]

4.56 DIMIA explained that this terminology has been adopted in order to reflect the fact that biometric technology generally stores a given personal identifier as a template, using a mathematical algorithm, which then allows for that template to be retrieved as meaningful identifying information.[53]

Authorising an identification test

4.57 The Victorian Bar questioned why existing visa holders detained under section 189 of the Act, by operation of section 190, do not have the same right to

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49 Mr Christopher Levingston, *Submission 1*, p. 4.

50 Victorian Bar, *Submission 4*, p. 2.

51 DIMIA, *Answers to questions on notice*, Attachment B, pp. 9-10.

52 Victorian Bar, *Submission 4*, p. 4.

53 DIMIA, *Answers to questions on notice*, Attachment B, p. 13.

request an authorisation of an identification test from a senior officer as those under proposed section 258B.[54]

4.58 Regarding the provisions of the Bill relating to suspected non-citizens (ie sections 188 through 192), the department advised that it is reasonable to assume that where a suspected non-citizen is required to give evidence of being a lawful non-citizen, this will be in circumstances where their status is not immediately apparent (for example they cannot readily produce evidence of holding a visa because they do not have such documentation available or that evidence is suspected to be fraudulent).[55]

4.59 The Victorian Bar also queried whether an officer will have a discretion to excuse compliance with collection provisions if a reasonable excuse for failure to provide identifiers existed, as provided for in United Kingdom legislation.[56]

4.60 In response, DIMIA pointed out that proposed subsection 261AA(1) provides that a non-citizen who is in immigration detention must, other than in prescribed circumstances, provide a personal identifier to an authorised officer. The reference to "other than in prescribed circumstances" provides for cases where it is not considered appropriate to collect a personal identifier from a detainee (for example in cases of prolonged illness or other incapacity).

4.61 The Victorian Bar also pointed out that currently a failure to record a request for an authorisation will not invalidate the identification test and questioned the situation that would operate under the Bill.[57]

4.62 DIMIA advised that "it is intended that recording of authorisation be recorded immediately wherever practicable". The Bill provides that this information must be recorded within 24 hours. However, there may be circumstances in which it is not practicable to do so immediately. The department advised that this may be the case where there is a large number of non-citizens involved in a given circumstance (for example unauthorised boat arrival) and it is not possible for all authorisations to be recorded immediately.

Identification tests

4.63 Proposed section 258E provides:

> **258E General rules for carrying out identification tests**
>
> An identification test that an authorised officer carries out under section 40, 46, 166, 170, 175, 188 or 192:

54 Victorian Bar, *Submission 4*, p. 3.

55 DIMIA, *Answers to questions on notice,* Attachment B, p. 10.

56 Victorian Bar, *Submission 4*, p. 3.

57 ibid.

(a) must be carried out in circumstances affording reasonable privacy to the non-citizen; and

(b) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the identification test or required or permitted by another provision of this Act; and

(c) must not involve the removal of more clothing than is necessary for carrying out the test; and

(d) must not involve more visual inspection than is necessary for carrying out the test; and

(e) unless the authorised officer has reasonable grounds to believe that the non-citizen is not a minor or an incapable person—must be carried out in accordance with the additional requirements of Division 13AB.

4.64 The Victorian Bar questioned whether the safeguards at proposed paragraphs 258E(b),(c) and (d) apply when the personal identifier is provided by way other than a test carried out by an authorised officer.[58]

4.65 In its response, the department advised that if an identifier is provided by way other than a test carried out by an authorised officer, then it will be provided by a third party. In some cases, for example with the likely future use of automated kiosks at airports, it would be impractical to ensure that the provisions of paragraph (b) are adhered to. However clear guidelines and the requirement of adherence to cultural sensitivities will be clearly articulated to those third parties.[59]

Personal access to information

4.66 The Victorian Bar proposed that the Bill should include a right for persons to access identification information in order to verify its accuracy and relationship to them. It should also include mechanisms for them to correct information, to know where it is kept and what matching has been undertaken.[60]

4.67 DIMIA advised that existing arrangements under Freedom of Information legislation will also apply to the proposed provisions of the Bill.

Care and counselling before and after testing

4.68 The UNHCR maintained that the proposed legislation could provide additional safeguards to seek to prevent any adverse physical or psychological effects on individuals concerned. Testing may aggravate precarious psychological or mental state. Accordingly, the UNHCR suggested that it would be useful to provide for professional care and counselling prior to, and after, the testing.[61]

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58 Victorian Bar, *Submission 4*, p. 3.

59 DIMIA, *Answers to questions on notice*, Attachment B, p. 11.

60 Victorian Bar, *Submission 4*, p. 4.

61 UNHCR, *Submission 6,* pp. 1-2.

4.69 DIMIA response stated that "in most cases, the most likely form of biometric testing would be fingerprinting (probably by live-scanning means) and/or taking a photograph. This is considered to be non-invasive". DIMIA reiterated that intimate forensic testing is prohibited. The department further advised that "it is envisaged that detailed policy guidelines on the taking of biometrics will be developed and could cover these matters".[62]

Scientific reliability of tests

4.70 UNHCR expressed the view that the Bill needs to be clearer on the scientific reliability of tests, and the legal implications of varying reliability. UNHCR also addressed the issue of inconclusive tests and suggested that the non-citizen concerned should have the right to another test.[63]

4.71 DIMIA responded that it does not consider it appropriate to include such references in the legislation. The department recognises that some biometric technology is still developing. However, other types of biometric technology such as fingerprints are regarded as highly reliable.

4.72 According to the department, it is also important to recognise that the use of a biometric would be only one of a number of issues that a decision-maker would take into account in forming a decision. It should also be noted that before regulations can be made for the purposes of paragraph 5A(1)(g) prescribing an identifier, the Minister must be satisfied that the identifier will promote one or more of the purposes referred to in subsection 5A(3).

4.73 Finally, the department addressed cases where the results of an identification test are inconclusive, for example, because the results are unusable or there are doubts as to the integrity of the process that produced them. DIMIA advised that it is in the interests of both DIMIA and the non-citizen concerned for a new personal identifier to be provided.[64]

Committee's conclusion

Subject to the recommendations outlined in this report, the Committee considers that the Bill should proceed.

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62 DIMIA, *Answers to questions on notice*, Attachment B, p. 13.

63 UNHCR, *Submission 6*, p. 2.

64 DIMIA, *Answers to questions on notice*, Attachment B, pp. 13-14.

Recommendation 7

Subject to the preceding recommendations, the Committee recommends that the Bill be agreed to.

Senator Marise Payne

Chair

DISSENTING REPORT BY THE AUSTRALIAN DEMOCRATS

1.1 The Australian Democrats have serious concerns regarding the use of biometric identification technology as proposed in this Bill. As the Federal Privacy Commissioner noted, this Bill enters "new territory in the area of personal identification".

1.2 We tend to agree with the Public Interest Advocacy Centre that the Government has failed to demonstrate a compelling need for this legislation. Given that this technology is still relatively new and involves significant intrusions into the privacy of individuals, we will adopt a cautious approach to this legislation.

1.3 We hope that the Government will give serious consideration to the concerns raised by the Committee and we reserve our position on the legislation, pending the Government's response.

Senator Andrew Bartlett
Australian Democrats

APPENDIX 1

SUBMISSIONS RECEIVED

Submission No.	Submitter
1	Christopher Levingston and Associates
2	Public Interest Advocacy Centre
3	Federal Privacy Commission
4	The Victorian Bar
4A	The Victorian Bar
5	Liberty Victoria
6	United Nations High Commissioner for Refugees

Additional Information

Answers to Questions taken on notice from Department of Immigration and Multicultural and Indigenous Affairs, 11 September 2003.

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Monday 8 September, 2003

Public Interest Advocacy Centre (via Teleconference)

Mr Simon Moran, Principal Solicitor
Ms Claire Wiseman, Solicitor

The Victorian Bar
Mr John Gibson

Department of Immigration and Multicultural and Indigenous Affairs
Mr Vincent McMahon, Executive Coordinator, Border Control and Compliance Division
Ms Janette Haughton, Assistant Secretary, Identity Fraud and Biometrics Branch
Mr Douglas Walker, Assistant Secretary, Visa Framework Branch, Parliamentary and Legal Division