

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Strengthening
Biometrics Integrity) Bill 2015 [Provisions]

June 2015

© Commonwealth of Australia 2015
ISBN 978-1-76010-207-4

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:
<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator the Hon Ian Macdonald (LP, QLD) (Chair)

Senator Jacinta Collins (ALP, VIC) (Deputy Chair)

Senator Catryna Bilyk (ALP, TAS)

Senator Barry O'Sullivan (NATS, QLD)

Senator Linda Reynolds (LP, WA)

Senator Penny Wright (AG, SA)

Substitute members

Senator Sue Lines (ALP, WA) to replace Senator Jacinta Collins (ALP, VIC)

Senator Sarah Hanson-Young (AG, SA) to replace Senator Penny Wright (AG, SA)

Secretariat

Ms Sophie Dunstone, Committee Secretary

Mr CJ Sautelle, Acting Principal Research Officer

Ms Jo-Anne Holmes, Administrative Officer

Suite S1.61

Telephone: (02) 6277 3560

Parliament House

Fax: (02) 6277 5794

CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

Table of contents

Members of the committee	iii
Recommendations	vii

Chapter 1

Introduction and Background	1
Referral of the inquiry	1
Conduct of the inquiry.....	1
Acknowledgment.....	1
Background.....	1
Purpose of the Bill	3
Overview of the Bill	4
Key provisions of the Bill.....	5

Chapter 2

Key Issues	11
Introduction of a single, broad power for collecting personal identifiers	11
Collection of biometric information from minors, 'incapable' persons and asylum seekers	17
Committee view.....	21
Labor Senators' Dissenting Report	25
Appendix 1 - Public submissions	29
Appendix 2 - Public hearings and witnesses	31
Appendix 3 - Tabled documents, answers to questions on notice and additional information	33

Recommendations

Recommendation 1

2.49 The committee recommends that consideration be given to ensuring that protections in line with those found in sections 258E and 258F of the *Migration Act 1958* apply to any means of collecting personal identifiers under proposed new paragraph 257A(5)(b) of the Bill.

Recommendation 2

2.54 The committee recommends that the Privacy Impact Assessment conducted in relation to the Bill is released publicly prior to the Senate's consideration of the Bill.

Recommendation 3

2.60 The committee recommends that the Bill be passed, subject to the preceding recommendations.

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).¹ 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 2015.²

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.

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.³

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.⁴

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.⁵

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'.⁶ 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.⁷

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'.⁸

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.

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'.⁹

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.¹⁰

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

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.¹¹

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'.¹² 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.¹³

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

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.

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.¹⁴

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.¹⁵

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.¹⁶

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:

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.¹⁷

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'.¹⁸ 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.¹⁹

17 EM, p. 18.

18 EM, p. 19.

19 EM, p. 19.

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.²⁰

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).²¹

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

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.²²

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.²³

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.²⁴ 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.²⁵

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

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.

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'.²⁶

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.²⁷ 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.

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'.

Chapter 2

Key Issues

2.1 Submitters and witnesses to the inquiry raised various issues in relation to the Bill. Of primary interest were the implications of introducing a single broad collection power in relation to biometric data. The types of personal identifiers to be collected, the means of collection, and the storage and retention of biometric data were all discussed in detail, particularly in relation to possible impacts on individuals' privacy. Issues relating to the procedures for the collection of personal identifiers from minors, incapable persons and individuals seeking asylum in Australia were also raised.

Introduction of a single, broad power for collecting personal identifiers

2.2 Submitters noted that the new, broad collection power in proposed new section 257A would provide for a wider range of collection powers in several respects, compared with the current regime for the provision of personal identifiers under the Migration Act.¹

2.3 In relation to the purposes for which biometric data may be collected, Australian Lawyers for Human Rights (ALHR) noted that the Bill expands this from the 12 existing purposes listed in subsection 5A(3) of the Migration Act, to the broader ability of officers to require the provision of personal identifiers in relation to 'the purposes of the Act and regulations'.²

2.4 The Australian Privacy Commissioner, Mr Timothy Pilgrim PSM, noted in his submission that, in particular, this represents a significant expansion of the circumstances in which biometric information can be collected from non-citizens, which is currently limited to the following range of circumstances: for the purpose of granting a visa; when a non-citizen wishes to enter or depart Australia; to determine whether a non-citizen holds a valid visa; and for the purpose of detention decision-making.³ The Privacy Commissioner stated:

[It] is important to ensure that such a broad expansion of the power to collect biometric information from non-citizens is necessary and, further, that it is proportionate to the objective of enabling [the department] to ensure the integrity of Australia's migration programme.⁴

2.5 ALHR argued that proposed new section 257A amounts to a 'broad, discretionary and unfettered power which is not limited in a proportional and legitimate manner', and recommended that 'the situations where biometric personal

1 See, for example: Australian Lawyers for Human Rights, *Submission 7*, [p. 2]; Australian Privacy Foundation, p. 1; Refugee Council of Australia, *Submission 13*, p. 2.

2 *Submission 7*, [p. 2].

3 *Submission 12*, p. 4.

4 *Submission 12*, pp 4-5.

identifiers are allowed are categorised and limited; the situations when an identification test can be requested is also limited; and a limit is placed on how many times an identification test can be requested.⁵

2.6 The Law Council of Australia (Law Council) expressed concern that some of the key parameters governing the collection of biometric information can be changed through the Migration Regulations rather than the Migration Act itself:

The categories of biometric data, and the purposes for which it should be collected, will raise significant questions of policy and have substantial privacy implications. Given that citizens and noncitizens will be required to provide one or more personal identifiers that are sensitive information under the Privacy Act 1988 (Cth)...it is inappropriate for the types of biometric data to be prescribed by regulations.⁶

2.7 The Law Council recommended that, in order to avoid ambiguity:

[T]he Bill should exhaustively define the purposes for which personal identifiers are collected and the types of personal identifiers that may be collected. The power to prescribe these matters by way of regulation should be removed from the Bill.⁷

2.8 The Privacy Commissioner agreed that the drafting of the Bill should be narrower in relation to the single collection power:

[It] would appear that the proposed expansion of the power to collect biometric information from non-citizens may be broader than is necessary to enable DIBP to perform their functions under the Migration Act.

...[To] minimise the privacy impacts of the Bill, any expansion of the existing power to collect biometric information from non-citizens should be drafted narrowly and limited to only what is necessary. Accordingly, I suggest that consideration be given to amending the Bill to clearly state the purposes for which this power is able to be exercised in the Act, rather than only referring generally to the purposes of the Migration Act and the Migration Regulations.⁸

2.9 In relation to the purposes for which personal identifiers could be collected under proposed new subsection 257A(1), the Department of Immigration and Border Protection (department) stated that this would allow for the collection of personal identifiers in all of the circumstances currently authorised in the Migration Act, as well as 'provid[ing] flexibility to authorise collecting personal identifiers in circumstances that may arise in the future'.⁹

5 Australian Lawyers for Human Rights, *Submission 7*, [p. 3].

6 *Submission 10*, p. 6.

7 *Submission 10*, p. 8.

8 *Submission 12*, p. 5.

9 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. 2].

2.10 On the question of the types of personal identifiers that can be collected, the department explained that the Bill does not alter the types of biometric data that can currently be collected under the Migration Act, and that if any additional types of personal identifiers were to be prescribed in the Migration Regulations (under existing paragraph 5A(1)(g) of the Migration Act), this regulation would still be subject to parliamentary scrutiny through the Senate Standing Committee on Regulations and Ordinances and the regulation disallowance process.¹⁰

Means of collecting personal identifiers

2.11 Some submitters and witnesses raised concerns relating to the power under proposed new paragraph 257A(5)(b) for the minister or an officer to require that a personal identifier must be provided 'in a specified way' rather than through an identification test. The primary concern expressed was that this power would allow for personal identifiers to be collected in a way that bypasses the legislative safeguards currently in place (in sections 258E and 258F of the Migration Act) when personal identifiers are collected through identification tests. The Law Council stated:

[T]he current system of safeguards applying to the collection of personal identifiers by means of an identification test, such as not involving the removal of more clothing than is necessary for carrying out the test and affording reasonable privacy to the person, will be able to be bypassed where an officer or the Minister authorises a different method of collection...The Bill should exhaustively define how personal identifiers must be provided rather than permitting the Minister or an officer to make such a determination.¹¹

2.12 The Privacy Commissioner noted that while the EM states this new power is only intended to be used in relation to the collection of fingerprints using mobile finger scanners, this restriction 'will apply in policy only'. The Privacy Commissioner concluded:

[If] an amendment to the Migration Act that removes the requirement for personal identifiers to be collected using an identification test is found to be both necessary and proportionate to enable [the department] to perform its functions, this should be done in a way that minimises the impact on individual's privacy. Accordingly, I suggest that the restriction outlined in the [EM], that the discretion is only intended to be used in relation to the collection of fingerprints using mobile finger scanners, be included within the Bill itself.¹²

10 Department of Immigration and Border Protection, *Responses to questions taken on notice at a public hearing on 16 April 2015* (received 30 April 2015), [pp 2-3].

11 *Submission 10*, p. 7. See also: NSW Council for Civil Liberties, *Submission 8*, p. 4.

12 *Submission 12*, p. 7.

2.13 The Refugee Council of Australia argued that procedural safeguards currently in place in relation to identification tests should be retained for all collection of personal identifiers.¹³

2.14 In relation to the means of collecting personal identifiers proposed under the Bill, the department noted that there are already some circumstances in the Migration Act under which personal identifiers may be collected by means other than an identification test, and that the Bill would:

- continue to permit the current arrangements that apply to collection of personal identifiers offshore, but in a much less complex manner;
- provide for more flexibility onshore to collect personal identifiers, particularly at Australia's borders; and
- authorise the expansion of the current consent-based verification check procedure, which is already in use at Australia's borders in a limited way to verify identity and detect persons of concern.¹⁴

2.15 The department also stated that policy guidance is issued to departmental staff about collection of biometric data in a way that complies with the Australian Privacy Principles (APPs), and that appropriate training is provided to staff to ensure that the implementation of the policy is compliant with the APPs.¹⁵

2.16 Ms Rachel Noble PSM, Deputy Secretary of the department, further explained the context in which personal identifiers are likely to be taken at Australia's borders using the expanded power provided for in the Bill:

At the moment, if we were to attempt to take a biometric of any person, in particular a fingerprint, the current act requires us to do that in a very narrow circumstance that is very strictly controlled and even, to some extent, locks us into ancient technology in order to do that. The act at the moment sets out a process that can take us up to an hour to take that biometric fingerprint—let's say—of any individual...[T]here is a process of needing to take that person into a private room, so that there is no-one else able to see what is happening, and seek their consent and other quite strict processes, if you like.

This bill keeps that identification test—and that is the sort of language we use to describe that process—intact. It also says that we might be able to take those biometrics in other ways that the minister so determines. The practical effect of this new bill is it gives us more flexible processes by which we might be able to collect that biometric.¹⁶

13 *Submission 13*, p. 3.

14 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. 3].

15 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. 3].

16 *Committee Hansard*, 16 April 2015, p. 15.

2.17 Ms Philippa de Veau, General Counsel of the department, added:

What is conceived at the moment is being able to use the powers that change and free up the manner in which personal identifiers might be collected. That is ultimately the intended outcome of the bill. That is, rather than having what we traditionally think of as a fingerprint test, when you and I log on to our mobile Apple phone, we may well use our thumb print to do so. The technology has evolved to the point of being able to verify quickly—without any humiliation, without any concerns—the identity of a person using that type of biometric.¹⁷

Expected usage of the new broad collection power

2.18 The Law Council noted that the new collection power has the potential to impact on the travel and privacy of citizens who may not be suspected of contravening an Australian law or posing a risk to national security. It argued that there should be a threshold test for requiring one or more personal identifiers from an individual only where an officer 'reasonably believes that the person has or will breach or potentially breach an Australian law or the individual may pose a threat to national security'.¹⁸

2.19 In response to this argument, the department highlighted the fact that the existing collection powers in the Migration Act and Regulations 'do not require an officer to reasonably believe that an individual has or will potentially breach an Australian law or pose a threat to national security' before a requirement to provide personal identifiers is issued. The department further argued that implementing such a requirement would 'significantly put at risk the integrity of Australia's visa programme' by preventing the current practice of collecting personal identifiers from visa applicants in 23 higher risk countries in order to conduct identity checks as well as criminal, security and immigration history checks prior to the grant of a visa.¹⁹

Adequacy of privacy safeguards in the Bill

2.20 The Australian Privacy Foundation argued that the Bill does not contain sufficient safeguards protecting the privacy of individuals, with too many protections being reliant on policy rather than enshrined in the legislation itself:

In terms of policy and legislation creep, concerns persist that many of the 'safeguards' identified in the Bill and EM is situated as mere "policy intent". Given the lack of adequate protections in the legislation, the Bill is subject to mission-creep through ongoing policy expansions in the absence of adequate parliamentary oversight and public transparency...While the department does not intend to collect personal identifiers in all circumstances (such as fingerprints from non-citizens), the insistence that policy guidance will be given at a subsequent period excludes crucial detail from the legislation. As a result, insistence on "policy intent" through

17 *Committee Hansard*, 16 April 2015, p. 14.

18 *Submission 10*, pp 7-8.

19 Department of Immigration and Border Protection, *Responses to questions taken on notice at a public hearing on 16 April 2015* (received 30 April 2015), [pp 3-4].

post hoc regulatory developments leaves open significant possibility for mission-creep associated with the Bill. This is especially the case when considered alongside the compounding effects of technological advancements.²⁰

Privacy Impact Assessment in relation to the Bill

2.21 Several submitters noted that, in its report on the 2014 'foreign fighters' legislation, the Parliamentary Joint Committee on Intelligence and Security recommended that the government consult with the Australian Privacy Commissioner and 'conduct a privacy impact statement prior to proposing any future legislative amendments which would authorise the collection of additional bio-metric data such as fingerprints and iris scans'.²¹

2.22 The Privacy Commissioner noted in his submission that a Privacy Impact Assessment (PIA) was being undertaken by the department in relation to the Bill:

I welcome this as an important step in ensuring that the Bill appropriately balances the protection of privacy and the need to ensure that [the department] is able to perform its functions under the Migration Act. However, I would also strongly encourage [the department] to publish the PIA. Publishing the PIA would help give the Australian public confidence about whether the privacy impacts of the Bill, and any necessary safeguards, have been fully considered.²²

2.23 The department confirmed that it has completed a PIA in relation to the measures in the Bill, and stated that a copy would be provided to the Privacy Commissioner 'before the Parliament next sits'.²³

Storage and retention of biometric data

2.24 Several submitters commented on whether the existing legislative framework governing the storage and retention of biometric information was sufficient to adequately protect the privacy of individuals whose personal identifier(s) have been collected.²⁴ The Law Council stated:

The collection of larger quantities and a broader range of biometric information create a risk that the data may be misused through unauthorised access and the risk of identity theft and fraud as a result of data breaches.²⁵

20 Australian Privacy Foundation, *Submission 9*, p. 3. See also Law Council of Australia, *Submission 10*, p. 23.

21 See, for example: Law Council, *Submission 10*, p. 9; Australian Privacy Foundation, *Submission 9*, p. 2.

22 *Submission 12*, p. 7.

23 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. 2].

24 See, for example: Refugee Council of Australia, *Submission 13*, p. 1; NSW Council for Civil Liberties, pp 4, 5 and 6; Australian Privacy Foundation, *Submission 9*, pp 2- 3.

25 *Submission 10*, p. 11.

2.25 The Law Council referred to two recent breaches of data held by the department, and argued that the Bill should be amended to include a requirement for the mandatory encryption of any biometric data retained by the department.²⁶ The Law Council also argued that current provisions allowing for the indefinite retention of certain identifying information should be removed, and that the issue of appropriate retention periods for biometric data more generally should be revisited through the Privacy Commissioner and public consultations.²⁷

2.26 In relation to issues surrounding the storage, retention and usage of biometric information, the department highlighted the fact that the Migration Act already has a framework for dealing with the storage, access and usage of biometric data:

Part 4A of the Migration Act creates a series of rules and offences that govern the access, disclosure, modification and destruction of identifying information (including personal identifiers). These provisions will continue to apply to personal identifiers collected under the Bill... These provisions in Part 4A of the Act ensure the department complies with the requirements of [Australian Privacy Principle] 11 in relation to identifying information. That is, those provisions protect such information from misuse, interference and loss, and from unauthorised modification, access and disclosure.²⁸

2.27 The department also noted that the Privacy Commissioner is currently conducting a Privacy Assessment with regard to the collection, storage sharing and use of biometric data, to be completed by 30 June 2015.²⁹

Collection of biometric information from minors, 'incapable' persons and asylum seekers

2.28 Submitters and witnesses raised various issues in relation to several specific groups of people likely to be affected by the changes in the Bill, namely minors, 'incapable' persons and individuals seeking humanitarian visas in Australia.

Collection of personal identifiers from minors

2.29 Several submitters commented on the changes proposed in the Bill that would alter the types of personal identifiers able to be collected from minors under the age of 15 and remove the requirement for a parent or independent guardian to be present when personal identifiers are collected.³⁰

26 *Submission 10*, p. 11.

27 *Submission 10*, p. 12.

28 Department of Immigration and Border Protection, *Responses to questions taken on notice at a public hearing on 16 April 2015* (received 30 April 2015), [pp 5-6].

29 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. 4].

30 See, for example: Australian Lawyers for Human Rights, *Submission 7*, pp 4-5; Law Council of Australia, *Submission 10*, p. 18; NSW Council for Civil Liberties, *Submission 8*, p. 5.

2.30 The department outlined in its submission how the proposed changes to the Act dealing with requirements for minors under the age of 15 to provide personal identifiers are intended to operate in practice:

- offshore: minors applying for a visa, as part of a family visa, from a country where facial images are already collected may also be required to provide fingerprints where there is a higher risk of trafficking;
- onshore:
 - borders—all minors (citizens and non-citizens) will continue to be subject to existing border processing using a passport. In extreme circumstances, such as suspected child trafficking cases, a minor may also be subject to a verification check;
 - visa applicants—in addition to the collection of facial images, non-citizen minors may be subject to collection of fingerprints to conduct identity, security, law enforcement and immigration history checks; and
- in detention: the existing provisions will continue to apply.³¹

Rights of minors in relation to the collection of personal identifiers

2.31 ALHR argued that the changes in relation to the collection of personal identifiers from minors are inconsistent with Australia's international obligations under the UN Convention on the Rights of the Child (CRC):

The amendments are said to be a child protection measure aimed at preventing child trafficking and/or smuggling. However...the proposed action is not consistent with the rights of unaccompanied children to be able to provide informed consent in relation to their own personal information. Creating a situation where unaccompanied children are required to provide information without any assistance is inconsistent with Australia's obligations under the CRC...Where a child is unable to consent, a guardian or parent is generally able to consent on behalf of the child. However, the current amendments make no provision for the requirement that an independent adult, guardian or independent observer be present which is in itself inconsistent with policy that an independent observer be present whenever an unaccompanied child is interviewed.³²

2.32 The Law Council expressed similar caution in relation to these provisions:

The Law Council has concern that the provisions enabling officers to obtain biometric information from children without consent or without the presence of a parent, guardian or independent person may, in certain circumstances, not always be in the best interests of the child and have the potential to be inconsistent with recognised rights of children.³³

31 *Submission 11*, p. 7.

32 *Submission 7*, pp 4 and 5.

33 *Submission 10*, p. 18.

2.33 In response to the concerns that specific guidelines should be developed in relation to obtaining biometric information from children, the department stated:

The Migration Act authorises the collection of personal identifiers in a dignified and respectful manner. Use of force or other form of coercion to collect personal identifiers under the new broad power is not authorised under amendments in the Bill.

The Department will implement additional policy guidelines that provide guidance to officers on how the new power to collect personal identifiers is to be exercised. The policy guidance will cover how personal identifiers are to be collected from minors and it will ensure that this is done in a respectful way. The policy guidance will be publicly available through the LEGENDcom database.³⁴

Accuracy of biometric information collected from young people

2.34 The Hon Terrence Aulich, Chair of the Privacy Experts Group of the Biometrics Institute, informed the committee that there are particular issues in relation to the accuracy of biometric information collected from minors:

[W]hen you are dealing with young people, virtually every form of biometrics has some form of difficulty. If it is fingerprints, a child's hand, as it grows, can widen the gap between the ridges and the valleys. That in itself can mainly create problems with registration at a later date, as opposed to enrolment, which is when you first have your biometric recorded. The difference between the original enrolment and the checking later on may be quite considerable, in which case there could be some false assumptions made by border authorities about a child over, let us say, a six-year period. In custody cases or other sensitive issues, that could create real problems.³⁵

2.35 Mr Aulich suggested that individuals who have information collected as minors should be able to access and verify that data at a later date:

[The Biometrics Institute suggests] that anyone who wanted to check their file at a later date—let us say they are 18-plus—should have access to that file, and they should be able to test the reliability and accuracy of the biometric that was originally taken from them. Particularly if you are believing that a biometric taken from a five-year-old is going to be good enough for when they are 18, you may well be misleading yourself as an authority, and you may well be creating issues for that person at a later date.³⁶

34 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. 7].

35 *Committee Hansard*, 16 April 2015, p. 10.

36 *Committee Hansard*, 16 April 2015, p. 11.

Collection of biometric data from 'incapable' persons

2.36 The Law Council of Australia commented on the issue of obtaining consent from people assessed as 'incapable' for the purposes of the Migration Act:

While the use of force to obtain personal identifiers is not permitted against an 'incapable person', [the Bill] is nonetheless silent on whether the consent of the 'incapable' person themselves is required. For example, a personal identifier could be collected without the knowledge of an incapable person.

This is particularly concerning in light of the fact that the current criteria used to assess whether a person is 'incapable' is discretionary, i.e. that authorised officers must simply have reasonable grounds to believe that a person is incapable.³⁷

2.37 The Law Council recommended that consent must be sought from the incapable person themselves where a guardian or independent person is not available to provide that consent on their behalf, and that the government should ensure adequate support is given to incapable people so that they can exercise legal capacity on an equal basis with others by either agreeing to or abstaining from providing personal identifiers.³⁸

2.38 ALHR argued that the existing restrictions in the Migration Act on collecting biometric information from incapable persons are a necessary safeguard and should not be removed as proposed in the Bill.³⁹

2.39 In relation to the collection of personal identifiers from incapable persons, the EM to the Bill notes:

Personal identifiers are very rarely collected from incapable persons. The policy intent is not to increase the collection of personal identifiers from such persons. Under policy, it is intended that personal identifiers are not to be required to be provided from incapable persons under the broad power in new section 257A...without the consent or presence of a parent, guardian or independent person, except in exceptional circumstances, such as intelligence that a particular person poses a higher risk.⁴⁰

Collection of biometric data from asylum seekers

2.40 Some submitters raised concerns that individuals seeking asylum in Australia would be adversely affected by the changes proposed in the Bill. The Law Council stated:

One form of personal identifier requested may be non-fraudulent or official documentation. This requirement may be particularly problematic for asylum seekers who may rely on fraudulent documentation to leave a country where they are subject to persecution by the State.

37 *Submission 10*, p. 22.

38 *Submission 10*, p. 23.

39 *Submission 7*, [p. 5].

40 EM, p. 29.

...[U]nder the Bill, the Minister may refuse a person a visa through section 40 or 46 of the Migration Act if the person refused to provide personal identifiers...[I]n addition to needing to resort to the use of false documentation to ensure safe passage to seek asylum, asylum seekers could fear what may be a reasonable request to provide identifiers due to their own experiences in their countries of origin.

There is no indication of how such an issue would be resolved, and this could potentially lead to refoulement of asylum seekers, which is inconsistent with Australia's commitments under the Convention relating to the Status of Refugees and international human rights law.⁴¹

2.41 The Law Council also noted, however, that 'there are benefits of the use of biometric data in the context of asylum seekers', and that the United Nations High Commissioner for Refugees (UNHCR) uses biometrics for the purpose of safeguarding the identity of refugees on the basis that they often lose their identity documents during displacement.⁴²

2.42 The department advised that the Bill does not seek to amend the safeguards that apply to protections for asylum seekers and refugees in relation to disclosure of personal identifiers.⁴³

Committee view

2.43 The committee considers that the collection of biometric information in the form of personal identifiers is an important tool in maintaining the integrity of Australia's borders and strengthening the ability of immigration officials to conduct identity and security checks of individuals. The committee is supportive of the overall intent of the Bill to simplify and streamline the provisions in the Migration Act dealing with the collection of personal identifiers. The committee has several specific comments in relation to the issues raised during the inquiry, as follows.

Circumstances in which biometric data can be collected

2.44 The committee notes that the new, single collection power provided for in proposed new section 257A of Bill does in some circumstances represent an expansion of the circumstances in which personal identifiers could be collected from individuals. The committee further notes the department's statement that the widening of the purposes for which biometric data can be collected would 'provide flexibility to authorise collecting personal identifiers in circumstances that may arise in the future'.⁴⁴

41 *Submission 10*, p. 17. See also: NSW Council for Civil Liberties, *Submission 8*, p. 5; Combined Refugee Action Group, *Submission 4*, p. 1.

42 *Submission 10*, p. 16.

43 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. 7].

44 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. 2].

2.45 In relation to the types of personal identifiers that may be collected, the committee accepts the department's argument that the Bill does not directly change the types of identifiers that may be collected, and that any new identifiers prescribed through the Migration Regulations (as can currently be done under the terms of the Migration Act) would still be subject to sufficient scrutiny as regulations disallowable by the Parliament.

Means of collecting personal identifiers

2.46 The committee acknowledges the concerns of some submitters in relation to the proposed new power for the minister or an officer to require a personal identifier to be provided in a way other than an identification test, particularly that the safeguards legislated in section 258E and 258F of the Migration Act would not be afforded in these circumstances.

2.47 The committee urges that consideration be given to specifying in the regulatory scheme the basic safeguards that will be implemented in relation to the collection of personal identifiers under proposed new subsection 257(5)(b) of the Bill. These safeguards may include ensuring that the collection must: afford reasonable privacy to the person; not involve the removal of more clothing than is necessary for carrying out the test; and not be conducted in a cruel, inhuman or degrading manner or a manner that fails to treat a person with humanity and respect for human dignity.

2.48 The committee agrees with the department, however, that proposed new subsection 258(5)(b) would provide necessary flexibility for officers in the collection of personal identifiers. The committee does not consider, therefore, that this amendment should be scrapped altogether, as some submitters have suggested, but should be retained with some basic safeguards as outlined above.

Recommendation 1

2.49 The committee recommends that consideration be given to ensuring that protections in line with those found in sections 258E and 258F of the *Migration Act 1958* apply to any means of collecting personal identifiers under proposed new paragraph 257A(5)(b) of the Bill.

Privacy safeguards

2.50 The committee considers that biometric data is sensitive and personal information, and that as such, its collection, storage and retention must only be conducted in such a way as to minimise the impact on the privacy of individuals.

2.51 The committee welcomes the department's assurances that it complies with the requirements of the *Privacy Act 1988* and the *Archives Act 1983* in relation to the storage and retention of biometric information, in addition to the requirements in relation to these issues in the Migration Act itself.

2.52 Further, the committee is pleased that the Privacy Commissioner is currently conducting a broad Privacy Assessment in relation to the overall arrangements for the collection, storage, sharing and use of biometric data, which will be finalised by 30 June 2015. The committee trusts that any issues raised by the Privacy Commissioner will be duly considered by the government, and that any required

changes to current operating procedures and requirements will be implemented, including via further legislative amendments if necessary.

2.53 In relation to the separate Privacy Impact Assessment (PIA) conducted by the department in relation to the specific measures contained in this Bill, the committee notes the department's assurance that the PIA would be provided to the Privacy Commissioner at the latest by the May 2015 Parliamentary sitting period. As such, the committee expects that the commissioner now has the benefit of the PIA. In order to allay any privacy concerns in relation to the Bill, and further inform debate in the Senate, the committee considers that the PIA should be released publicly prior to the Bill's passage through Parliament.

Recommendation 2

2.54 The committee recommends that the Privacy Impact Assessment conducted in relation to the Bill is released publicly prior to the Senate's consideration of the Bill.

Collection of biometric data from minors and 'incapable' persons

2.55 The committee considers that the measures in the Bill designed to enhance the department's ability to collect biometric information from minors are warranted, given ongoing concerns in relation to human trafficking and the emerging threat of young people seeking to become involved in terrorist activities overseas.

2.56 The committee also considers that the collection of personal identifiers from minors must be consistent with recognised rights of children and should not separate children from a parent or guardian unnecessarily; these issues should be adequately addressed in the department's policies and guidelines.

2.57 The committee acknowledges that additional safeguards may be necessary in relation to the collection of personal information from children, particularly in light of the evidence from the Biometrics Institute that there are increased issues in relation to the accuracy of biometric information obtained from young people, in comparison with adults. The committee is of the view that the Privacy Commissioner should consider this issue further as part of the broad Privacy Assessment currently being conducted in relation to the collection, storage sharing and use of biometric data, scheduled to be completed by the end of June 2015.

2.58 In relation to the collection of personal identifiers from incapable persons, the committee acknowledges the EM's statement that this rarely occurs, and that there are very few circumstances in which this would occur in the absence of a parent, guardian or independent person. The committee agrees with the Law Council that consent should be sought from the incapable person themselves where a guardian or independent person is not available to provide that consent on their behalf, and that adequate support should be given to incapable people so that they can exercise legal capacity on an equal basis with others.

Collection of personal identifiers from individuals seeking asylum in Australia

2.59 The committee considers that enhanced use of biometric identifiers has the potential to assist the department in confirming the identity of individuals seeking

humanitarian visas in Australia. The committee considers that departmental officials should undertake the collection and use of personal identifiers from these vulnerable individuals in accordance with the existing safeguards in the Migration Act (which are not proposed to be altered by the Bill), and in line with the UNHCR's guidelines on the use of biometric information.

Recommendation 3

2.60 The committee recommends that the Bill be passed, subject to the preceding recommendations.

**Senator the Hon Ian Macdonald
Chair**

Labor Senators' Dissenting Report

Key Issues

1.1 Labor Senators of the Committee note serious concerns regarding the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 in its current form.

1.2 We argue that the bill lacks genuine independent oversight, and that the retention of and arbitrary collection of biometric information raises concerns from collection, and then subsequent use and retention.

Issues pertaining to retention of and access to data collected

1.3 Labor Senators would support a thorough review by the Privacy Commissioner, prior to passage of the bill, as to whether the current obligations to store biometric data securely are sufficient or whether increased security for the dataset is required, and support the recommendation of the majority report that a separate Privacy Impact Assessment (PIA) conducted by the department in relation to the specific measures contained in this bill be undertaken and made publically available.

1.4 We note evidence provided by Ms Ganopolsky regarding similar legislation passed in the United Kingdom:

... the common thread is the fact that under the UK model, albeit it is in its early phases since introduction, the focus on the technical questions around the controls for handling biometric data seem quite pertinent. Hence, further assessment of that model seems to be warranted, in particular the questions about how information is retained, what discretions are given for the review period and what assumptions are made. The focus of much debate, including some case law arising out of the UK, was around the presumption that information would be retained indefinitely. And that has caused some concern with the Council of Europe; and hence the legislative response that you see in the UK. The subject matter of biometric data and how the UK has dealt with the framework is worthy of consideration.¹

1.5 It would appear from the evidence that the issue of indefinite biometric data retention has raised wide concern, and was as such addressed, particularly with regard to proportionality and the arbitrary nature of the retention.

Safeguards for the collection of data from minors & vulnerable groups

1.6 Labor Senators hold specific concerns around the lack of safeguards for minors and 'incapable' persons in the legislation, particularly that the consent or presence of a parent, guardian or independent person will not be required.

1 Ms Olga Ganopolsky, Law Council of Australia, *Committee Hansard*, 16 April 2015, p. 2.

1.7 Submitters, including the Law Council, raised serious concerns on these matters, suggesting that:

...safeguards should be implemented in terms of guidelines to make sure that biometric information that is collected is done so in a respectful manner, and also that an independent guardian be appointed for unaccompanied minors.²

1.8 These concerns are echoed by the Labor Senators of the Committee. Balance must be ensured in the collection of data.

1.9 We also note that the aforementioned UK legislation inserted specific protections for vulnerable groups,³ as such demonstrating that balance is possible when legislating for biometric data collection.

1.10 In the hearing, particular issues were raised with regard to how the collection and retention of data could specifically be harmful to a child:

Senator LINES: The example I was given was that there could be a custody matter between parents that involved a child, and that one of the ways you would identify that child is through biometrics. In the case of that child, when the child turns 18 and is no longer covered by the custody arrangement, are you suggesting that the biometrics for that child would then have this indefinite flag?

Ms Ganopolsky: With the current model—potentially, yes.⁴

1.11 Labor Senators also retain specific concerns that discretion will be decided by policy, and not proper parliamentary oversight:

Ms Ganopolsky: It goes back to the comments that were made about arbitrary and non-discriminate powers with no threshold. It needs to be seen in the context of comments already made about the collection and then subsequent use and retention that flows from it. So things start at the collection point, and the absence of those controls at the collection point are in essence potentially magnified as the information keeps moving along the chain of its use. The majority of times it would be a legitimate use, but taking it back to the legal framework, the lack of threshold tests and the lack of subsequent protections of concern—which has already been outlined in the submissions and, I think, aired here—

Mr Dunn: Absolutely. Mr Chair, we would presume that the department would implement some type of policy with respect to when that discretion would be used. I guess the concern that we would have in those restrictions not being in the legislation is that the policy could change at any time and the department's current good intentions may, at some time in the future, no longer be the case and they may have a very different intention or a different imperative. The concern is that legislatively it is unbounded and

2 Dr Natasha Molt, Law Council of Australia, *Committee Hansard*, 16 April 2015, p. 3.

3 Ms Olga Ganopolsky, Law Council of Australia, *Committee Hansard*, 16 April 2015, p. 3.

4 *Committee Hansard*, 16 April 2015, p. 5.

that is a particular concern because it can change at any time without the scrutiny or oversight of parliament in that regard.⁵

1.12 Particular concerns were raised in the hearing with regard to the indefinite period of retention of the data, where prima facie periods of retention with the ability for extension of retention times exist in similar legislation overseas.⁶

1.13 The changes in the bill also stand in opposition to the recently amended Privacy Act, where tests must exist when retaining data that it be reasonable, and only retained for a period for which it is useful. With evidence given by the Law Council, in particular as it relates to the usefulness of retaining data collected from children, it would appear that the useful life of the data is not indefinite, as prescribed by the legislation.

1.14 Whilst the majority report did note that the collection of personal identifiers from minors must be consistent with recognised rights of children, and noted that such issues would be addressed in the department's policies and guidelines, Labor Senators believe that only legislative measures will adequately provide the required safeguards.

Lack of regulatory powers of the Privacy Commissioner

1.15 Evidence presented by the Law Council of Australia highlighted the lack of regulatory powers of the Privacy Commissioner. Labor Senators support suggestions from Ms Ganopolsky of the Law Council, in that the matter has not yet been adequately tested, and therefore should warrant further investigation and consideration before legislation in this bill.⁷

1.16 Labor Senators would welcome amendments to the bill that provide for additional security measures reflecting the sensitivity of the data collected, and would

5 Ms Olga Ganopolsky and Mr Matthew Dunn, Law Council of Australia, *Committee Hansard*, 16 April 2015, p. 7.

6 Ms Olga Ganopolsky, Law Council of Australia, *Committee Hansard*, 16 April 2015, pp 2 and 5.

7 Ms Olga Ganopolsky, Law Council of Australia, *Committee Hansard*, 16 April 2015, p. 2.

support amendments that address a requirement to notify the individual and the Privacy Commissioner for data breach notification in the event of a breach.

Recommendation

1.17 Whilst Labor Senators note that the Committee majority recommends that a Privacy Impact Assessment (PIA) be undertaken and made publically available before passage of the bill, we believe that the concerns of the Committee are best addressed as amendments to the legislation.

1.18 As such, Labor Senators recommend that this Bill not be passed in its current form.

Senator Catryna Bilyk
Senator for Tasmania

Senator Sue Lines
Senator for Western Australia

Appendix 1

Public submissions

- 1 Ms Justine Donohue
- 2 Ms Carolyn Elliott
- 3 Biometrics Institute Ltd
- 4 Combined Refugee Action Group
- 5 Ms Jade Charles
- 6 Humanist Society of Victoria
- 7 Australian Lawyers for Human Rights
- 8 New South Wales Council for Civil Liberties (NSWCCL)
- 9 The Australian Privacy Foundation
- 10 Law Council of Australia
- 11 Department Immigration and Border Protection
- 12 Australian Privacy Commissioner
- 13 Refugee Council of Australia
- 14 Ms Jeni Wills
- 15 Mr Shayne Chester
- 16 Ms Pamela Jacobs
- 17 Mr W and Mrs L Cusworth
- 18 Ms Bec Pearce

Appendix 2

Public hearings and witnesses

Thursday 16 April 2015—Sydney

AULICH, The Hon. Terrence Gordon, Chair, Privacy Experts Group, Biometrics Institute

DE VEAU, Ms Philippa, General Counsel, Department of Immigration and Border Protection

DUNN, Mr Matthew David, Director, Policy, Law Council of Australia

GANOPOLSKY, Ms Olga, Chair, Privacy Committee, Law Council of Australia

GEDDES, Mrs Linda, First Assistant Secretary, Department of Immigration and Border Protection

MOLT, Dr Natasha, Senior Policy Lawyer, Criminal and National Security Law Focus, Law Council of Australia

NOBLE, Ms Rachel, PSM, Deputy Secretary, Policy Group, Department of Immigration and Border Protection

WALSH, Dr Simon, Acting National Manager, Forensics, Australian Federal Police

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

Thursday 16 April 2015

- 1 Department of Immigration and Border Protection – responses to questions taken on notice at a public hearing on 16 April 2015 (received 30 April 2015)

