

## **Part 4—Detainees' rights to facilities for obtaining legal advice etc.**

### **24 Detainee may have access to certain advice, facilities etc.**

The person responsible for detention of a detainee must afford to him or her all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her detention.

Note: This clause corresponds to section 256 of the *Migration Act 1958*.

## Part 5—Identifying detainees

### Division 1—Preliminary

#### 25 Definitions

In this Part, unless the contrary intention appears:

**identification test** means a test carried out in order to obtain a personal identifier.

**incapable person** means a person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier.

**independent person** means a person (other than an authorised officer, detention officer or approved officer) who:

- (a) is capable of representing the interests of a non-citizen who is providing, or is to provide, a personal identifier; and
- (b) as far as practicable, is acceptable to the non-citizen who is providing, or is to provide, the personal identifier; and
- (c) if the non-citizen is a minor—is capable of representing the minor's best interests.

**minor** means a person who is less than 18 years old.

**non-citizen** means a person who is not an Australian citizen.

**personal identifier** has the meaning given by clause 26.

Note: The definitions of expressions in this clause correspond closely to definitions of those expressions in section 5 of the *Migration Act 1958*.

#### 26 Meaning of *personal identifier*

- (1) In this Part:

***personal identifier*** means any of the following (including any of the following in digital form):

- (a) fingerprints or handprints of a person (including those taken using paper and ink or digital liveness scanning technologies);
  - (b) a measurement of a person's height and weight;
  - (c) a photograph or other image of a person's face and shoulders;
  - (d) an audio or a video recording of a person (other than a video recording under clause 37);
  - (e) an iris scan;
  - (f) a person's signature;
  - (g) 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*.
- (2) Before the Governor-General makes regulations for the purposes of paragraph (g) of the definition of ***personal identifier*** in subclause (1) prescribing an identifier, the Minister must be satisfied that:
- (a) obtaining the identifier would not involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*; and
  - (b) the identifier is an image of, or a measurement or recording of, an external part of the body; and
  - (c) obtaining the identifier will promote one or more of the purposes referred to in subclause (3).
- (3) The purposes are:
- (a) to assist in the identification of, and to authenticate the identity of, any person who can be required under this Schedule to provide a personal identifier; and
  - (b) to assist in identifying, in the future, any such person; and
  - (c) to enhance the ability to identify non-citizens who have a criminal history in matters relating to the environment; and
  - (d) to combat document and identity fraud in matters relating to the environment; and

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- (e) to complement anti-people smuggling measures; and
- (f) to inform the governments of foreign countries of the identity of non-citizens who have been detained under, or charged with offences against, an environmental law; and
- (g) to facilitate international cooperation to combat activities that involve a breach of the laws of Australia or of a foreign country.

Note: This clause corresponds closely to section 5A of the *Migration Act 1958*.

**27 Limiting the types of identification tests that approved officers may carry out**

- (1) The Secretary may, in an instrument authorising an authorised officer or detention officer as an approved officer for the purposes of carrying out identification tests under this Part, specify the types of identification tests that the approved officer may carry out.
- (2) Such an approved officer is not an approved officer in relation to carrying out an identification test that is not of a type so specified.

Note: This clause corresponds closely to section 5D of the *Migration Act 1958*.

## **Division 2—Identification of detainees**

### **Subdivision A—Provision of personal identifiers**

#### **28 Detainees must provide personal identifiers**

- (1) A non-citizen in detention must (other than in the prescribed circumstances) provide to an approved officer one or more personal identifiers.
- Note: A person who is an Australian citizen, or is a non-citizen but an Australian resident, may be in detention but must be released as soon as an authorised officer or detention officer knows or reasonably believes the person is an Australian citizen or resident. See clause 13.
- (2) An approved officer must not require, for the purposes of subclause (1), a detainee to provide a personal identifier other than any of the following (including any of the following in digital form):
- (a) fingerprints or handprints of the detainee (including those taken using paper and ink or digital liveness scanning technologies);
  - (b) a measurement of the detainee's height and weight;
  - (c) a photograph or other image of the detainee's face and shoulders;
  - (d) the detainee's signature;
  - (e) any other personal identifier of a type prescribed for the purposes of this paragraph.

Note: Division 3 sets out further restrictions on the personal identifiers that minors and incapable persons can be required to provide.

- (3) The one or more personal identifiers are to be provided by way of one or more identification tests carried out by the approved officer in accordance with this Division.

Note 1: Subject to certain restrictions, clause 32 allows reasonable force to be used to carry out identification tests under this Division.

Note 2: This clause corresponds closely to section 261AA of the *Migration Act 1958*.

**29 Approved officers must require and carry out identification tests**

- (1) The approved officer must, other than in the circumstances prescribed for the purposes of subclause 28(1):
  - (a) require the non-citizen to provide one or more personal identifiers, of the type or types prescribed, by way of one or more identification tests carried out by the approved officer; and
  - (b) carry out the one or more identification tests on the non-citizen.
- (2) However:
  - (a) if the types of identification tests that the approved officer may carry out are specified under clause 27—each identification test must be of a type so specified; and
  - (b) each identification test must be carried out in accordance with Subdivision B; and
  - (c) unless the approved officer has reasonable grounds to believe that the non-citizen is not a minor or an incapable person—each identification test must be carried out in accordance with the additional requirements of Division 3.

Note: Subclauses (1) and (2) correspond closely to section 261AB of the *Migration Act 1958*.

- (3) If:
  - (a) the approved officer is authorised because of clause 7 (which effectively treats as approved officers for the purposes of certain provisions of this Schedule certain persons who are authorised Migration Act officers for the purposes of certain provisions of the *Migration Act 1958*); and
  - (b) an instrument under section 5D of that Act specifies the types of identification test the authorised Migration Act officer may carry out;paragraph (2)(a) of this clause has effect as if the specified types (except any specified under subclause 7(3) in relation to the authorised Migration Act officer) had been specified under clause 27.

### **30 Information to be provided before carrying out identification tests**

- (1) Before carrying out an identification test, the approved officer must:
  - (a) inform the non-citizen that the non-citizen may ask that an independent person be present while the identification test is carried out and that the test be carried out by a person of the same sex as the non-citizen; and
  - (b) inform the non-citizen of such other matters as are specified in the regulations.
- (2) For the purposes of subclause (1), the approved officer *informs* the non-citizen of a matter if the approved officer informs the non-citizen of the matter, through an interpreter if necessary, in a language (including sign language or braille) in which the non-citizen is able to communicate with reasonable fluency.
- (3) The approved officer may comply with this clause by giving to the non-citizen, in accordance with the regulations, a form setting out the information specified in the regulations. However, the information must be in a language (including braille) in which the non-citizen is able to communicate with reasonable fluency.
- (4) A form mentioned in subclause (3) is not a legislative instrument.

Note: This clause corresponds closely to section 261AC of the *Migration Act 1958*.

### **Subdivision B—How identification tests are carried out**

#### **31 General rules for carrying out identification tests**

An identification test under this Division:

- (a) must be carried out in circumstances affording reasonable privacy to the non-citizen; and
- (b) if the non-citizen so requests and it is practicable to comply with the request—must not be carried out in the presence or

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view of a person who is of the opposite sex to the non-citizen; and

- (c) 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 is not required or permitted by another provision of this Schedule; and
- (d) must not involve the removal of more clothing than is necessary for carrying out the test; and
- (e) must not involve more visual inspection than is necessary for carrying out the test; and
- (f) if the test is one of 2 or more identification tests to be carried out on the non-citizen—must be carried out at the same time as the other identification tests, if it is practicable to do so.

Note: This clause corresponds closely to section 261AD of the *Migration Act 1958*.

## **32 Use of force in carrying out identification tests**

### *When use of force is permitted*

- (1) Subject to subclause (2) and clause 33, an approved officer, or a person authorised under clause 34 to help the approved officer, may use reasonable force:
  - (a) to enable the identification test to be carried out; or
  - (b) to prevent the loss, destruction or contamination of any personal identifier or any meaningful identifier derived from the personal identifier.

However, this clause does not authorise the use of force against a minor or an incapable person, or if the personal identifier in question is a person's signature.

- (2) The approved officer or person must not use force unless:
  - (a) the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and
  - (b) all reasonable measures to carry out the identification test without the use of force have been exhausted; and



- (c) the use of force in carrying out the identification test is authorised under subclause (4).

*Applications for authorisation to use force*

- (3) An approved officer may apply to a senior authorising officer (who is not an approved officer referred to in subclause (1)) for an authorisation to use force in carrying out the identification test.

*Authorisation to use force*

- (4) The senior authorising officer may authorise the use of force in carrying out the identification test if he or she is reasonably satisfied that:
- (a) the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; and
  - (b) all reasonable measures to carry out the identification test without the use of force have been exhausted.
- (5) An authorisation under subclause (4):
- (a) may be given by telephone, fax or other electronic means; and
  - (b) must be recorded in writing, and signed by the person giving the authorisation, within one business day after it is given.
- (6) A record made under paragraph (5)(b) is not a legislative instrument.
- (7) A failure to comply with paragraph (5)(b) does not affect the validity of an identification test carried out on the basis of that authorisation.
- (8) The power to give an authorisation under subclause (4) cannot be delegated to any other person.

*Definition*

- (9) In this clause:

**senior authorising officer** means an authorised officer, or detention officer, whom the Secretary has authorised, or who is included in a class of authorised officers or detention officers whom the Secretary has authorised, to perform the functions of a senior authorising officer under this clause.

Note: This clause corresponds closely to section 261AE of the *Migration Act 1958*.

### **33 Identification tests not to be carried out in cruel, inhuman or degrading manner etc.**

For the purposes of this Schedule, the carrying out of the identification test is not of itself taken:

- (a) to be cruel, inhuman or degrading; or
- (b) to be a failure to treat a person with humanity and with respect for human dignity.

However, nothing in this Schedule authorises the carrying out of the identification test in a cruel, inhuman or degrading manner, or in a manner that fails to treat a person with humanity and with respect for human dignity.

Note: This clause corresponds closely to section 261AF of the *Migration Act 1958*.

### **34 Approved officer may get help to carry out identification tests**

An approved officer may ask another approved officer or an authorised officer or detention officer to help him or her to carry out the identification test, and the other person may give that help.

Note: This clause corresponds closely to section 261AG of the *Migration Act 1958*.

### **35 Identification tests to be carried out by approved officer of same sex as non-citizen**

If the non-citizen requests that the identification test be carried out by an approved officer of the same sex as the non-citizen, the test

must only be carried out by an approved officer of the same sex as the non-citizen.

Note: This clause corresponds closely to section 261AH of the *Migration Act 1958*.

### 36 Independent person to be present

The identification test must be carried out in the presence of an independent person if:

- (a) force is used in carrying out the identification test; or
- (b) both of the following apply:
  - (i) the non-citizen requests that an independent person be present while the identification test is being carried out;
  - (ii) an independent person is readily available at the same place as the non-citizen and is willing to attend the test within a reasonable time.

Note: This clause corresponds closely to section 261AI of the *Migration Act 1958*.

### 37 Recording of identification tests

- (1) An approved officer may video record the carrying out of the identification test.
- (2) If the carrying out of the identification test is not video recorded, the approved officer may decide that the identification test must be carried out in the presence of an independent person.

Note: This clause corresponds closely to section 261AJ of the *Migration Act 1958*.

### 38 Retesting

*When retesting is permitted*

- (1) If:
  - (a) an approved officer has carried out an identification test (the ***earlier test***) on a non-citizen in accordance with this

Division (including a test authorised under subclause (4));  
and

(b) either:

- (i) a personal identifier that is provided as a result of the earlier test being carried out is unusable; or
- (ii) an approved officer, authorised officer or detention officer is not satisfied about the integrity of that personal identifier;

the approved officer who carried out the earlier test or another approved officer may require the non-citizen to provide the personal identifier again, and may carry out the test again in accordance with this Division, if:

- (c) the requirement is made while the earlier test is being carried out or immediately after it was carried out; or
  - (d) carrying out the test again is authorised under subclause (4).
- (2) If the non-citizen is required under subclause (1) to provide the personal identifier again, the non-citizen is taken, for the purposes of this Division, not to have provided the personal identifier as a result of the earlier test being carried out.

*Applications for authorisation to retest*

- (3) An approved officer may apply for an authorisation to carry out the test again. The application is to be made to:
- (a) if the earlier test was not a test authorised under subclause (4)—a senior authorising officer (who is not an approved officer, authorised officer or detention officer referred to in subclause (1)); or
  - (b) if the earlier test was a test authorised under subclause (4) by a senior authorising officer—the Secretary, the Director, the Chairperson of the Great Barrier Reef Marine Park Authority or an SES Band 3 employee in the Department (who is not an approved officer, authorised officer or detention officer referred to in subclause (1)).

*Authorisation to retest*

- (4) The senior authorising officer, Secretary, Director, Chairperson or SES Band 3 employee (as the case requires) may authorise the test to be carried out again if:
  - (a) he or she is reasonably satisfied that the personal identifier that is provided as a result of the earlier test being carried out is unusable; or
  - (b) he or she is not reasonably satisfied about the integrity of that personal identifier.
- (5) An authorisation under subclause (4):
  - (a) may be given by telephone, fax or other electronic means; and
  - (b) must be recorded in writing, and signed by the person giving the authorisation, within one business day after it is given.
- (6) A record made under paragraph (5)(b) is not a legislative instrument.
- (7) A failure to comply with paragraph (5)(b) does not affect the validity of an identification test carried out on the basis of that authorisation.
- (8) The power to give an authorisation under subclause (4) cannot be delegated to any other person.

*Use of force*

- (9) An authorisation under subclause (4) does not authorise the use of force in carrying out an identification test.

Note: See clause 32 on the use of force in carrying out identification tests.

*Effect of refusing to authorise retesting*

- (10) If an application for an authorisation to carry out an identification test again on a non-citizen is refused, the non-citizen is taken, for the purposes of this Schedule, to have complied with any

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requirement under this Schedule to provide the personal identifier in question.

*Definitions*

(11) In this clause:

**senior authorising officer** means an authorised officer, or detention officer, who:

- (a) has been authorised, or is included in a class of authorised officers or detention officers who have been authorised, by the Secretary to perform the functions of a senior authorising officer under this clause; and
- (b) is not the Secretary or an SES Band 3 employee in the Department.

**SES Band 3 employee** means an SES employee with a classification of Senior Executive Band 3, and includes an SES employee who has been temporarily assigned duties that have been allocated a classification of Senior Executive Band 3.

Note: This clause corresponds closely to section 261AK of the *Migration Act 1958*.

**Subdivision C—Obligations relating to video recordings of identification tests**

**39 Definitions**

In this Subdivision, unless the contrary intention appears:

**permitted provision**, of a video recording, has the meaning given by subclause 42(2).

**provide**, in relation to a video recording, includes provide access to the recording.

**related document** means a document that contains information, derived from a video recording made under clause 37 or from a copy of such a recording, from which the identity of the individual

on whom the identification test in question was carried out is apparent or can reasonably be ascertained.

**video recording** means a video recording made under clause 37 or a copy of such a recording, and includes a related document.

Note: This clause corresponds closely to section 261AKA of the *Migration Act 1958*.

#### **40 Accessing video recordings**

- (1) A person commits an offence if:
  - (a) the person accesses a video recording; and
  - (b) the person is not authorised under clause 41 to access the video recording for the purpose for which the person accessed it.

Penalty: Imprisonment for 2 years.

- (2) This clause does not apply if the access is through the provision of a video recording that is a permitted provision.

Note 1: A defendant bears an evidential burden in relation to the matter in subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

Note 2: This clause corresponds closely to section 261AKB of the *Migration Act 1958*.

#### **41 Authorising access to video recordings**

- (1) The Secretary may, in writing, authorise a specified person, or any person included in a specified class of persons, to access:
  - (a) all video recordings; or
  - (b) a specified video recording, or video recordings of a specified kind.
- (2) The Secretary must specify in an authorisation under this clause, as the purpose or purposes for which access is authorised, one or more of the following purposes:
  - (a) providing a video recording to another person in accordance with this Subdivision;

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- (b) administering or managing the storage of video recordings;
  - (c) making a video recording available to the person to whom it relates;
  - (d) modifying related documents in order to correct errors or ensure compliance with appropriate standards;
  - (e) any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Schedule;
  - (f) complying with laws of the Commonwealth or the States or Territories;
  - (g) disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, the Secretary must not specify as a purpose for which access is authorised a purpose that will include or involve the purpose of:
- (a) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
  - (b) prosecuting a person for such an offence;
- if the identifying information in question relates to a personal identifier of a prescribed type.

Note: This clause corresponds closely to section 261AKC of the *Migration Act 1958*.

**42 Providing video recordings**

- (1) A person commits an offence if:
- (a) the person's conduct causes a video recording to be provided to another person; and
  - (b) the provision of the recording is not a permitted provision of the recording.

Penalty: Imprisonment for 2 years.



- (2) A ***permitted provision*** of a video recording is a provision of the recording that:
- (a) is for the purpose of administering or managing the storage of video recordings; or
  - (b) is for the purpose of making the video recording in question available to the non-citizen to whom it relates; or
  - (c) is for the purpose of a proceeding, before a court or tribunal, relating to the non-citizen to whom the video recording in question relates; or
  - (d) is for any purpose connected with determining whether a civil or criminal liability has arisen from a person carrying out or helping to carry out an identification test under this Schedule; or
  - (e) is for the purpose of an investigation by the Information Commissioner under the *Privacy Act 1988* or the Ombudsman relating to carrying out an identification test; or
  - (f) is made to a prescribed body or agency for the purpose of the body or agency inquiring into the operation of provisions of this Schedule relating to carrying out an identification test; or
  - (g) takes place with the written consent of the non-citizen to whom the video recording in question relates; or
  - (h) is a disclosure authorised by clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, a provision of a video recording is not a permitted provision of the recording if:
- (a) it constitutes a disclosure of identifying information relating to a personal identifier of a prescribed type; and
  - (b) it is for the purpose of:
    - (i) investigating an offence against a law of the Commonwealth or a State or Territory (other than an offence involving whether an identification test was carried out lawfully); or
    - (ii) prosecuting a person for such an offence.

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Note: This clause corresponds closely to section 261AKD of the *Migration Act 1958*.

**43 Unauthorised modification of video recordings**

A person commits an offence if:

- (a) the person causes any unauthorised modification of a video recording; and
- (b) the person intends to cause the modification; and
- (c) the person knows that the modification is unauthorised.

Penalty: Imprisonment for 2 years.

**44 Unauthorised impairment of video recordings**

A person commits an offence if:

- (a) the person causes any unauthorised impairment of:
  - (i) the reliability of a video recording; or
  - (ii) the security of the storage of a video recording; or
  - (iii) the operation of a system by which a video recording is stored; and
- (b) the person intends to cause the impairment; and
- (c) the person knows that the impairment is unauthorised.

Penalty: Imprisonment for 2 years.

**45 Meanings of *unauthorised modification* and *unauthorised impairment* etc.**

(1) In this Subdivision:

- (a) modification of a video recording; or
- (b) impairment of the reliability of a video recording; or
- (c) impairment of the security of the storage of a video recording; or
- (d) impairment of the operation of a system by which a video recording is stored;

by a person is unauthorised if the person is not entitled to cause that modification or impairment.

- (2) Any such modification or impairment caused by the person is not unauthorised merely because he or she has an ulterior purpose for causing it.
- (3) For the purposes of an offence under this Subdivision, a person causes any such unauthorised modification or impairment if the person's conduct substantially contributes to it.
- (4) For the purposes of subclause (1), if:
  - (a) a person causes any modification or impairment of a kind mentioned in that subclause; and
  - (b) the person does so under a warrant issued under the law of the Commonwealth, a State or a Territory;the person is entitled to cause that modification or impairment.

Note: This clause corresponds closely to section 261AKG of the *Migration Act 1958*.

#### **46 Destroying video recordings**

A person commits an offence if:

- (a) the person is the person who has day-to-day responsibility for the system under which a video recording is stored; and
- (b) the person fails physically to destroy the recording, and all copies of the recording, within 10 years after it was made.

Penalty: Imprisonment for 2 years.

## **Division 3—Identification of minors and incapable persons**

### **47 Minors**

#### *Minors less than 15 years old*

- (1) A non-citizen who is less than 15 years old must not be required under this Schedule to provide a personal identifier other than a personal identifier consisting of:
  - (a) a measurement of the non-citizen's height and weight; or
  - (b) the non-citizen's photograph or other image of the non-citizen's face and shoulders.

#### *Persons present while identification test is carried out*

- (2) If a non-citizen who is a minor provides a personal identifier, in accordance with a requirement under this Schedule, by way of an identification test carried out by an approved officer, the test must be carried out in the presence of:
  - (a) a parent or guardian of the minor; or
  - (b) an independent person.
- (3) However, if the Minister administering the *Immigration (Guardianship of Children) Act 1946* is the guardian of the minor, the test must be carried out in the presence of an independent person other than that Minister.

Note: This clause corresponds closely to subsections 261AL(1), (5) and (6) of the *Migration Act 1958*.

### **48 Incapable persons**

#### *Incapable persons*

- (1) A non-citizen who is an incapable person must not be required under this Schedule to provide a personal identifier other than a personal identifier consisting of:
  - (a) a measurement of the non-citizen's height and weight; or

- (b) the non-citizen's photograph or other image of the non-citizen's face and shoulders.

*Persons present while identification test is carried out*

- (2) If a non-citizen who is an incapable person provides a personal identifier, in accordance with a requirement under this Schedule, by way of an identification test carried out by an approved officer, the test must be carried out in the presence of:
  - (a) a parent or guardian of the incapable person; or
  - (b) an independent person.

Note: This clause corresponds closely to subsections 261AM(1) and (4) of the *Migration Act 1958*.

## Division 4—Obligations relating to detainees' identifying information

### Subdivision A—Preliminary

#### 49 Definitions

In this Division:

**disclose**, in relation to identifying information that is a personal identifier provided under clause 28, includes provide unauthorised access to the personal identifier.

Note: Clause 52 deals with authorised access to identifying information.

**identifying information** means the following:

- (a) any personal identifier provided under clause 28;
- (b) any meaningful identifier derived from any such personal identifier;
- (c) any record of a result of analysing any such personal identifier or any meaningful identifier derived from any such personal identifier;
- (d) any other information, derived from any such personal identifier, from any meaningful identifier derived from any such personal identifier or from any record of a kind referred to in paragraph (c), that could be used to discover a particular person's identity or to get information about a particular person.

**permitted disclosure** has the meaning given by subclauses 53(2) and (3).

**unauthorised impairment** has the meaning given by clause 57.

**unauthorised modification** has the meaning given by clause 57.

Note: The definitions of expressions in this clause correspond closely to definitions of those expressions in section 336A of the *Migration Act 1958*.

## 50 Application

Section 15.4 of the *Criminal Code* (extended geographical jurisdiction—category D) applies to all offences against this Division.

Note: This clause corresponds closely to section 336B of the *Migration Act 1958*.

## Subdivision B—Accessing identifying information

### 51 Accessing identifying information

- (1) A person commits an offence if:
- (a) the person accesses identifying information; and
  - (b) the person is not authorised under clause 52 to access the identifying information for the purpose for which the person accessed it.

Penalty: Imprisonment for 2 years.

- (1A) This clause does not apply if the person believes on reasonable grounds that the access is necessary to prevent or lessen a serious and imminent threat to the life or health of the person or of any other person.

Note: A defendant bears an evidential burden in relation to the matter in subclause (1A) (see subsection 13.3(3) of the *Criminal Code*).

- (2) This clause does not apply if the access is through a disclosure that is a permitted disclosure.

Note 1: A defendant bears an evidential burden in relation to the matter in subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

Note 2: This clause corresponds closely to section 336C of the *Migration Act 1958*.

**52 Authorising access to identifying information**

- (1) The Secretary may, in writing, authorise a specified person, or any person included in a specified class of persons, to access identifying information of the kind specified in the authorisation.
- (2) The Secretary must specify in an authorisation under this clause, as the purpose or purposes for which access is authorised, one or more of the following purposes:
  - (a) one or more of the purposes set out in subclause 26(3);
  - (b) disclosing identifying information in accordance with this Division;
  - (c) administering or managing the storage of identifying information;
  - (d) making identifying information available to the person to whom it relates;
  - (e) modifying identifying information to enable it to be matched with other identifying information;
  - (f) modifying identifying information in order to correct errors or ensure compliance with appropriate standards;
  - (g) the purposes of this Act;
  - (h) complying with laws of the Commonwealth or the States or Territories;
  - (i) disclosing personal information under clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, the Secretary must not specify as a purpose for which access is authorised a purpose that will include or involve the purpose of:
  - (a) investigating an offence against a law of the Commonwealth or a State or Territory; or
  - (b) prosecuting a person for such an offence;if the identifying information in question relates to a personal identifier of a prescribed type.



Note: This clause corresponds closely to section 336D of the *Migration Act 1958*.

## **Subdivision C—Disclosing identifying information**

### **53 Disclosing identifying information**

- (1) A person commits an offence if:
- (a) the person's conduct causes disclosure of identifying information; and
  - (b) the disclosure is not a permitted disclosure.

Penalty: Imprisonment for 2 years.

- (1A) This clause does not apply if the person believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the person or of any other person.

Note: A defendant bears an evidential burden in relation to the matter in subclause (1A) (see subsection 13.3(3) of the *Criminal Code*).

- (2) A ***permitted disclosure*** is a disclosure that:
- (a) is for the purpose of data-matching in order to:
    - (i) identify, or authenticate the identity of, a person; or
    - (ii) facilitate the processing of persons entering or departing from Australia; or
    - (iii) identify non-citizens who have a criminal history, who are of character concern (as defined in the *Migration Act 1958*) or who are of national security concern; or
    - (iv) combat document and identity fraud in immigration matters; or
    - (v) ascertain whether an applicant for a protection visa had sufficient opportunity to avail himself or herself of protection before arriving in Australia; or
    - (vi) inform the governments of foreign countries of the identity of non-citizens who are, or are to be, removed from Australia; or

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**Part 5** Identifying detainees

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Clause 53

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- (b) is for the purpose of administering or managing the storage of identifying information; or
- (c) is authorised under clause 54 and is for the purpose, or one or more of the purposes, for which the disclosure is authorised; or
- (d) is for the purpose of making the identifying information in question available to the person to whom it relates; or
- (da) is to an agency of the Commonwealth or of a State or Territory in order to verify that a person is an Australian citizen or holds a visa of a particular class; or
- (e) takes place under an arrangement entered into with an agency of the Commonwealth, or with a State or Territory or an agency of a State or Territory, for the exchange of identifying information; or
- (ea) is reasonably necessary for the enforcement of the criminal law of the Commonwealth or of a State or Territory; or
- (eb) is required by or under a law of the Commonwealth or of a State or Territory; or
- (f) is for the purpose of a proceeding, before a court or tribunal, relating to the person to whom the identifying information in question relates; or
- (g) is for the purpose of an investigation by the Information Commissioner or the Ombudsman relating to action taken by the Department; or
- (h) is made to a prescribed body or agency for the purpose of the body or agency inquiring into the operation of provisions of this Schedule relating to:
  - (i) carrying out an identification test; or
  - (ii) requiring the provision of a personal identifier; or
- (ha) is a disclosure of an audio or a video recording for the purposes of:
  - (i) this Act or the regulations; and
  - (ii) transcribing or translating the recording, or conducting language analysis or accent analysis of the recording; or
- (i) takes place with the written consent of the person to whom the identifying information in question relates; or

- (j) is a disclosure authorised by clause 59 (about disclosure of information about a person who has been in detention, for the purposes of the immigration detention or removal of the person).
- (3) However, a disclosure is not a permitted disclosure if:
  - (a) it is a disclosure of identifying information relating to a personal identifier of a prescribed type; and
  - (b) it is for the purpose of:
    - (i) investigating an offence against a law of the Commonwealth or a State or Territory; or
    - (ii) prosecuting a person for such an offence.

Note: This clause corresponds closely to section 336E of the *Migration Act 1958*.

#### **54 Authorising disclosure of identifying information to foreign countries etc.**

- (1) The Secretary may, in writing, authorise a specified authorised officer or detention officer, any authorised officer or detention officer included in a specified class of authorised officers or detention officers, or an Agency (as defined in the *Public Service Act 1999*) prescribed by the regulations, to disclose identifying information of the kind specified in the authorisation to one or more of the following:
  - (a) one or more specified foreign countries;
  - (b) one or more specified bodies each of which is:
    - (i) a police force or police service of a foreign country; or
    - (ii) a law enforcement body of a foreign country; or
    - (iii) a border control body of a foreign country;
  - (c) one or more specified international organisations, or specified organisations of foreign countries, that are responsible for matters relating to the environment;
  - (d) one or more prescribed bodies of a foreign country, of the Commonwealth or of a State or Territory;
  - (e) one or more prescribed international organisations.

- (2) The Secretary must specify in the authorisation, as the purpose or purposes for which disclosure is authorised, one or more of the purposes set out in subclause 26(3).

Note: This clause corresponds closely to subsections 336F(1) and (2) of the *Migration Act 1958*.

### **Subdivision D—Modifying and impairing identifying information**

#### **55 Unauthorised modification of identifying information**

A person commits an offence if:

- (a) the person causes any unauthorised modification of identifying information; and
- (b) the person intends to cause the modification; and
- (c) the person knows that the modification is unauthorised.

Penalty: Imprisonment for 2 years.

Note: This clause corresponds closely to section 336G of the *Migration Act 1958*.

#### **56 Unauthorised impairment of identifying information**

A person commits an offence if:

- (a) the person causes any unauthorised impairment of:
  - (i) the reliability of identifying information; or
  - (ii) the security of the storage of identifying information; or
  - (iii) the operation of a system by which identifying information is stored; and
- (b) the person intends to cause the impairment; and
- (c) the person knows that the impairment is unauthorised.

Penalty: Imprisonment for 2 years.

Note: This clause corresponds closely to section 336H of the *Migration Act 1958*.

**57 Meanings of *unauthorised modification* and *unauthorised impairment* etc.**

- (1) In this Division:
- (a) modification of identifying information; or
  - (b) impairment of the reliability of identifying information; or
  - (c) impairment of the security of the storage of identifying information; or
  - (d) impairment of the operation of a system by which identifying information is stored;
- by a person is unauthorised if the person is not entitled to cause that modification or impairment.
- (2) Any such modification or impairment caused by the person is not unauthorised merely because he or she has an ulterior purpose for causing it.
- (3) For the purposes of an offence under this Division, a person causes any such unauthorised modification or impairment if the person's conduct substantially contributes to it.
- (4) For the purposes of subclause (1), if:
- (a) a person causes any modification or impairment of a kind mentioned in that subclause; and
  - (b) the person does so under a warrant issued under the law of the Commonwealth, a State or a Territory;
- the person is entitled to cause that modification or impairment.

Note: This clause corresponds closely to section 336J of the *Migration Act 1958*.

**Subdivision E—Retaining identifying information**

**58 Identifying information may be indefinitely retained**

Identifying information may be indefinitely retained.

Note: This clause corresponds closely to paragraph 336L(1)(a) of the *Migration Act 1958*, because under this Schedule identifying

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Clause 58

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information will always be about someone who is or has been in detention.

## **Part 6—Disclosure of detainees' personal information**

### **59 Disclosure of detainees' personal information**

- (1) For the purposes described in subclause (2), an agency or organisation that is or has been responsible for the detention of an individual may disclose personal information about the individual to an agency, or organisation, that is or will be responsible for:
- (a) taking the individual into immigration detention; or
  - (b) keeping the individual in immigration detention; or
  - (c) causing the individual to be kept in immigration detention; or
  - (d) the removal of the individual.
- (2) The purposes are:
- (a) the immigration detention of the individual; and
  - (b) the removal of the individual; and
  - (c) the welfare of the individual while in immigration detention or being removed.

- (3) In this clause:

**agency** has the same meaning as in the *Privacy Act 1988*.

**immigration detention** has the same meaning as in the *Migration Act 1958*.

**organisation** has the same meaning as in the *Privacy Act 1988*.

**personal information** has the same meaning as in the *Privacy Act 1988*.

**removal** has the same meaning as in the *Migration Act 1958*.

## Endnotes

### Endnote 1—About the endnotes

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## Endnotes

### Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes

Endnote 2—Abbreviation key

Endnote 3—Legislation history

Endnote 4—Amendment history

### Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

### Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

### Editorial changes

The *Legislation Act 2003* authorises First Parliamentary Counsel to make editorial and presentational changes to a compiled law in preparing a compilation of the law for registration. The changes must not change the effect of the law. Editorial changes take effect from the compilation registration date.

If the compilation includes editorial changes, the endnotes include a brief outline of the changes in general terms. Full details of any changes can be obtained from the Office of Parliamentary Counsel.

### Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can



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Endnote 1—About the endnotes

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be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation “(md)” added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation “(md not incorp)” is added to the details of the amendment included in the amendment history.

## Endnotes

### Endnote 2—Abbreviation key

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#### Endnote 2—Abbreviation key

ad = added or inserted	o = order(s)
am = amended	Ord = Ordinance
amdt = amendment	orig = original
c = clause(s)	par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)
C[x] = Compilation No. x	pres = present
Ch = Chapter(s)	prev = previous
def = definition(s)	(prev...) = previously
Dict = Dictionary	Pt = Part(s)
disallowed = disallowed by Parliament	r = regulation(s)/rule(s)
Div = Division(s)	reloc = relocated
ed = editorial change	renum = renumbered
exp = expires/expired or ceases/ceased to have effect	rep = repealed
F = Federal Register of Legislation	rs = repealed and substituted
gaz = gazette	s = section(s)/subsection(s)
LA = <i>Legislation Act 2003</i>	Sch = Schedule(s)
LIA = <i>Legislative Instruments Act 2003</i>	Sdiv = Subdivision(s)
(md) = misdescribed amendment can be given effect	SLI = Select Legislative Instrument
(md not incorp) = misdescribed amendment cannot be given effect	SR = Statutory Rules
mod = modified/modification	Sub-Ch = Sub-Chapter(s)
No. = Number(s)	SubPt = Subpart(s)
	<u>underlining</u> = whole or part not commenced or to be commenced

## Endnote 3—Legislation history

## Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Environment Protection and Biodiversity Conservation Act 1999	91, 1999	16 July 1999	16 July 2000 (s 2(2))	
Environmental Reform (Consequential Provisions) Act 1999	92, 1999	16 July 1999	Sch 8 and 9 (item 1): 16 July 2000 (s 2(1))	Sch 9 (item 1)
Public Employment (Consequential and Transitional) Amendment Act 1999	146, 1999	11 Nov 1999	Sch 1 (items 422, 423): 16 July 2000 (s 2(3))	—
Corporations (Repeals, Consequential and Transitionals) Act 2001	55, 2001	28 June 2001	s 4–14 and Sch 3 (item 172): 15 July 2001 (s 2(3))	s 4–14
Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001	82, 2001	11 July 2001	Sch 1 (items 1–82): 11 Jan 2002 (s 2(3)) Sch 1 (items 83–86): 11 July 2001 (s 2(1)(b))	Sch 1 (items 70–82)
Regional Forest Agreements Act 2002	30, 2002	5 Apr 2002	Sch 1: 3 May 2002 (s 2(1) item 3)	—
Statute Law Revision Act 2002	63, 2002	3 July 2002	Sch 1 (items 15, 16, 18): 16 July 2000 (s 2(1) items 10, 11, 13) Sch 1 (item 17): 11 Jan 2002 (s 2(1) item 12)	—

## Endnotes

### Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Crimes Legislation Enhancement Act 2003	41, 2003	3 June 2003	Sch 3 (items 31, 32): 16 July 2000 (s 2(1) item 21) Sch 3 (item 42): 3 June 2003 (s 2(1) item 1)	Sch 3 (item 42)
Australian Heritage Council (Consequential and Transitional Provisions) Act 2003	86, 2003	23 Sept 2003	Sch 1 (item 2): 1 Jan 2004 (s 2(1) item 2)	—
Environment and Heritage Legislation Amendment Act (No. 1) 2003	88, 2003	23 Sept 2003	Sch 1 and 3: 1 Jan 2004 (s 2(1) items 2, 4 and gaz 2003, No. GN47) Sch 2: <u>awaiting commencement (s 2(1) item 3)</u> Remainder: 23 Sept 2003 (s 2(1) items 1, 5)	Sch 1 (items 8, 24, 25), Sch 3 (item 1) and Sch 4 (item 1G) Sch 3 (item 1A)
<b>as amended by</b>				
Environment and Heritage Legislation Amendment Act (No. 1) 2006	165, 2006	12 Dec 2006	Sch 1 (items 846, 847): 19 Feb 2007 (s 2(1) item 15 and F2007L00411)	—
Aboriginal and Torres Strait Islander Commission Amendment Act 2005	32, 2005	22 Mar 2005	Sch 4 (item 23): 24 Mar 2005 (s 2(1) item 4)	—
Administrative Appeals Tribunal Amendment Act 2005	38, 2005	1 Apr 2005	Sch 1 (item 207): 16 May 2005 (s 2(1) item 6)	—

## Endnote 3—Legislation history

<b>Act</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>	<b>Application, saving and transitional provisions</b>
Statute Law Revision Act 2006	9, 2006	23 Mar 2006	Sch 1 (items 13–15): 16 July 2000 (s 2(1) item 9)	—
Offshore Petroleum (Repeals and Consequential Amendments) Act 2006	17, 2006	29 Mar 2006	Sch 2 (item 21): 1 July 2008 (s 2(1) item 2)	—
Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006	125, 2006	4 Nov 2006	Sch 2 (item 97): 1 July 2007 (s 2(1) item 2)	—
Environment and Heritage Legislation Amendment Act (No. 1) 2006	165, 2006	12 Dec 2006	Sch 1 (items 1–604, 606–762, 764–780, 783–835): 19 Feb 2007 (s 2(1) items 2– 4, 7–9 and F2007L00411) Sch 1 (item 605): 1 Jan 2007 (s 2(1) item 2 and F2006L04046) Sch 1 (item 763): 15 Jan 2007 (s 2(1) item 4 and F2007L00129) Sch 1 (items 781, 782): <u>awaiting commencement (s 2(1) items 5, 6)</u> Sch 2: 12 Dec 2006 (s 2(1) item 16)	Sch 2

## Endnotes

### Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
<b>as amended by</b>				
Statute Law Revision Act 2008	73, 2008	3 July 2008	Sch 2 (item 14): 19 Feb 2007 (s 2(1) item 50) Sch 2 (item 15): 12 Dec 2006 (s 2(1) item 51)	—
Migration Legislation Amendment (Information and Other Measures) Act 2007	63, 2007	15 Apr 2007	Sch 1 (items 1–15, 60, 61): 1 May 2007 (s 2(1) item 2 and F2007L01135)	Sch 1 (items 60, 61)
Statute Law Revision Act 2008	73, 2008	3 July 2008	Sch 1 (items 21–26): 19 Feb 2007 (s 2(1) items 13–18)	—
Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008	117, 2008	21 Nov 2008	Sch 3 (item 14): 22 Nov 2008 (s 2(1) item 4)	—
Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008	125, 2008	25 Nov 2008	Sch 3 (items 1, 2): 26 Nov 2008 (s 2(1) item 2) Sch 4 (items 1–37, 42–44) and Sch 5 (items 1–87): 25 Nov 2009 (s 2(1) item 3)	Sch 4 (items 42–44)
Statute Law Revision Act 2010	8, 2010	1 Mar 2010	Sch 1 (item 25) and Sch 5 (item 47): 1 Mar 2010 (s 2(1) items 2, 31) Sch 5 (item 137): 1 Mar 2010 (s 2(1) item 38)	—

## Endnote 3—Legislation history

<b>Act</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>	<b>Application, saving and transitional provisions</b>
Freedom of Information Amendment (Reform) Act 2010	51, 2010	31 May 2010	Sch 5 (items 32, 33), Sch 6 (items 43–48) and Sch 7: 1 Nov 2010 (s 2(1) item 7)	Sch 7
Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010	103, 2010	13 July 2010	Sch 6 (items 1, 55): 1 Jan 2011 (s 2(1) items 3, 5)	—
Environment Protection and Biodiversity Conservation Amendment (Recreational Fishing for Mako and Porbeagle Sharks) Act 2010	107, 2010	14 July 2010	15 July 2010 (s 2)	—
Territories Law Reform Act 2010	139, 2010	10 Dec 2010	Sch 1 (items 62–65): 11 Dec 2010 (s 2(1) item 2)	—
Statute Law Revision Act 2011	5, 2011	22 Mar 2011	Sch 7 (item 54): 19 Apr 2011 (s 2(1) item 18)	—
Acts Interpretation Amendment Act 2011	46, 2011	27 June 2011	Sch 2 (items 551–562) and Sch 3 (items 10, 11): 27 Dec 2011 (s 2(1) items 3, 12)	Sch 3 (items 10, 11)
Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Act 2012	131, 2012	19 Sept 2012	19 Sept 2012 (s 2)	—

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### Endnote 3—Legislation history

<b>Act</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>	<b>Application, saving and transitional provisions</b>
Statute Law Revision Act 2012	136, 2012	22 Sept 2012	Sch 1 (item 50): 22 Sept 2012 (s 2(1) item 2)	—
Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Act 2012	145, 2012	24 Oct 2012	Sch 1: 9 Nov 2012 (s 2(1) item 2 and F2012L02158)	—
Financial Framework Legislation Amendment Act (No. 1) 2013	8, 2013	14 Mar 2013	Sch 1 (items 3, 4): 15 Mar 2013 (s 2)	Sch 1 (item 4)
Maritime Powers (Consequential Amendments) Act 2013	16, 2013	27 Mar 2013	Sch 2: 27 Mar 2014 (s 2(1) item 2)	—
Environment Protection and Biodiversity Conservation Amendment Act 2013	60, 2013	21 June 2013	Sch 1: 22 June 2013 (s 2(1) item 2)	Sch 1 (items 19, 20, 22–25)
Aboriginal Land Rights and Other Legislation Amendment Act 2013	93, 2013	28 June 2013	Sch 1 (items 28–36): 29 June 2013 (s 2)	Sch 1 (items 35, 36)
Statute Law Revision Act (No. 1) 2014	31, 2014	27 May 2014	Sch 1 (items 22–24) and Sch 4 (item 80): 24 June 2014 (s 2(1) items 2, 9)	—