THE LAW SOCIETY
OF NEW SOUTH WALES

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The Hon. Natalie Ward MLC
Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

By email: law@parliament.nsw.gov.au
cc: lauren.evans@parliament.nsw.gov.au

Dear Chair,

Inquiry into the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

Thank you for the opportunity to make a submission to the Standing Committee on Law and Justice Inquiry into the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018 ("Bill"). The Law Society's Privacy and Data Law Committee contributed to this submission.

As noted by the NSW Attorney General, the Hon. Mark Speakman SC MP, in his Second Reading Speech:

> In October 2017 at the Special Meeting of the Council of Australian Governments on Counter-Terrorism, first Ministers entered into an Intergovernmental Agreement, or an IGA, committing to establish and participate in the National Facial Biometric Matching Capability, in short "the capability" and "the national agreement".[1]

The National Facial Biometric Matching Capability ("Capability") is proposed to provide for a range of face matching services to be conducted, including a Face Verification Service and Face Identification Service. The Capability is reliant on data matching of biometric data of residents extracted from identification photographs provided to government agencies for various purposes, such as driver licensing.

The Bill is proposed to authorise the sharing of photographs and personal information of NSW residents to enable the proposed arrangements for the Capability and to enable authorised NSW government agencies to participate in the Capability.

[1] The Hon. Mark Speakman SC MP, Second Reading Speech, Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, 17 October 2018.

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1. Parliamentary debate and legislative approval for the Capability

In the 2017 Intergovernmental Agreement ("IGA"), Commonwealth and State Governments committed to establishing and participating in the Capability. The Capability was to be established and maintained by the Commonwealth Government.

The Capability represents a significant extension of existing government data matching capabilities. It includes within its scope sensitive personal information of almost all NSW residents.

The Law Society has concerns about the scope and reach of the Capability and associated risks of unnecessary encroachment upon the privacy of citizens. As it is currently drafted, the Bill allows authorised government agencies to collect photographs and associated personal information from the Capability without stating for what purpose the collection is being made[2] and to keep and use them for "any lawful purpose in connection with the exercise of its functions".[3] The nexus between the two authorisations requires further clarification. In its current form, the Bill raises concerns, first as to whether the purpose of the collection of photographs and associated personal information is aligned to the specific purpose for which the photographs and personal information will be used and, second, whether there is a risk of expansion of the purpose.

Commonwealth legislative authority for developing, operating and maintaining the identity matching services to enable the Capability is sought in the Identity-Matching Services Bill 2018 (Cth). However, the Bill has not yet passed the Commonwealth Parliament.

The Law Society has contributed to submissions of the Law Council of Australia in relation to the Identity-Matching Services Bill 2018.[4] In its submission, the Law Council of Australia raised concerns in relation to:

(1) Whether information taken for a particular purpose, could be used for other purposes for which an individual's consent had not been obtained;[5]

(2) Whether the Identity-Matching Services Bill 2018 trespassed on individual rights and liberties in unnecessary or disproportionate ways, thereby constituting an arbitrary interference with the right to privacy under Article 17 of the *International Covenant on Civil and Political Rights;*[6]

(3) Whether the scope of the scheme would lack parliamentary scrutiny and oversight.[7]

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[2] Section 271A(2).
[3] Section 271A(4).
[4] See Law Council of Australia, *Review of the Identity-matching Services Bill 2018 and the Australian Passports Amendment (Identity-matching Services) Bill 2018,* 21 March 2018 available at https://www.lawcouncil.asn.au/resources/submissions/review-of-the-identity-matching-services-bill-2018-and-the-australian-passports-amendment-identity-matching-services-bill-2018. See also Law Council of Australia, *Supplementary Submission: Review of the Identity-matching Services Bill 2018,* 6 April 2018 available at https://www.lawcouncil.asn.au/resources/submissions/supplementary-submission-review-of-the-identity-matching-services-bill-2018.
[5] See See Law Council of Australia, *Review of the Identity-matching Services Bill 2018 and the Australian Passports Amendment (Identity-matching Services) Bill 2018* at para. 12.
[6] Ibid. at para. 13.
[7] Ibid. at para. 20.

These and other submissions made by the Law Council of Australia are equally relevant in the context of the NSW Bill to the extent that the NSW Bill is for the purpose of enabling the Capability and is reliant on the privacy and security safeguards to be provided by the Commonwealth.

The Law Council's submission in relation to the Identity Matching Services Bill 2018 highlights the significant privacy concerns surrounding biometric data which, unlike other identification data, is not able to be changed in the event it is compromised by a data breach. The submission also highlights uncertainty as to the precise purposes for which such data is authorised to be used and the extent to which the scope of the Capability can be extended without appropriate parliamentary oversight.

The Law Society is concerned that the NSW Bill is apparently being advanced ahead of the passage of the Commonwealth enabling legislation. This is particularly so in circumstances where the latter legislation has been subject to review by the Parliamentary Joint Committee on Intelligence and Security of the Commonwealth Parliament and the outcomes of that review are not yet publicly known.

2. Amendments proposed by the Bill

The Bill provides that authorised government agencies may:

(1) Collect photographs and associated personal information from the Capability (cl 271A(2));

(2) Keep and use photographs and associated personal information from the Capability "for any lawful purpose in connection with the exercise of its functions" (cl 271A(4)); and

(3) Release to the Capability "any photographs and personal information held by the agency" (cl 271A(5)).

While the Second Reading speech states that these provisions are to operate "in accordance with the strict conditions of the new section 271A of the Act,"[8] cl 271A of the Bill contains no express conditions as to the operation of its provisions. The Bill accordingly provides no assurance as to what controls or safeguards will operate to protect the sensitive personal information shared pursuant to the Capability.

Given the significant privacy implications of the Capability, the Law Society is concerned that the proposed legislation to authorise NSW sharing of photographs and personal information, and participation for the purposes of the Capability:

(1) Has not been appropriately justified as proportionate in its intrusions on privacy of citizens; and

(2) Does not demonstrate appropriate safeguards will exist to protect sensitive personal information of individuals processed pursuant to the Capability.

The Law Society notes that the Bill is proposed to commence on assent, potentially ahead of the commencement of reciprocal Commonwealth legislation and the associated privacy and security safeguards foreshadowed in the IGA.

[8] The Hon. Mark Speakman SC MP, Second Reading Speech, n. 1.

3. Recommendation

The Law Society recommends that prior to passing the Bill, a thorough public Privacy Impact Assessment ("PIA") be undertaken by the NSW Privacy Commissioner. This PIA should examine all potential privacy impacts of the Capability, if there are alternative means to meet the stated purpose for the Capability and the minimum safeguards necessary to protect the privacy of NSW residents if the Capability is to be implemented.

The Law Society thanks you for the opportunity to comment. If you have any questions, please do not hesitate to contact Ida Nursoo, Policy Lawyer on 9926 0275 or email ida.nursoo@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President