

Submission
No 3

**INQUIRY INTO ROAD TRANSPORT AMENDMENT
(NATIONAL FACIAL BIOMETRIC MATCHING
CAPABILITY) BILL 2018**

Name: Ms Valerie Heath
Date Received: 2 November 2018

Hon Natalie Ward MLC

Chair

Standing Committee on Law and Justice

Legislative Council

NSW Parliament,

Dear Chair,

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

1. I thank the Committee for the opportunity to make a submission on this Bill.
2. I am an Australian legal practitioner. I make this submission in my personal capacity.
3. Given the brevity of the period for submissions and the importance of the Bill, there is not time to examine in a legalistic way the drafting of the Bill and whether that drafting could be improved.
4. The real issue is the policy given effect by the Bill.
5. That policy is one advanced by the Federal government but by this Bill will be adopted and facilitated by the government of NSW.

6. The purpose and effect of the Bill is to
 - a. effectively, make drivers licences and other documents issued by the government of NSW and its agencies, individual national identity ‘cards’ (these identity cards will be virtual as the state government is phasing out physical cards in favour of digital licences);
 - b. contribute to amassing in the hands of Federal government agencies, in particular the Department of Home Affairs and ASIO, electronic dossiers on almost every Australian;
 - c. provide a means for thorough-going mass surveillance of the Australian population;
 - d. provide a means for real-time facial identification and geo-location of individual Australians in public and, eventually, private places;
 - e. allow this information to be interrogated and disclosed for an uncontrolled variety of purposes by an uncontrolled variety of government agencies, private contractors and, eventually, private enterprise.

7. The Explanatory Memorandum for the Bill refers to the Intergovernmental Agreement on identity-matching entered in October 2017 but does not refer to the Commonwealth Bill that if passed will provide the legislative framework for the “Capability” or “Inter-operability Hub” (two of the Federal government’s rather Orwellian euphemisms for the proposed database and mass-surveillance network).

8. In considering the Bill, the Committee should also consider the Identity-matching Services Bill 2018 (Cth) (“Cth IMS Bill). The Cth IMS Bill provides for the establishment of the “interoperability hub” (cl 14) by the Secretary of the Department of Home Affairs, being a “facility ... for relaying electronic communications between bodies and persons for the purposes of requesting and providing identity-matching services”. This is the same facility as referred to in the Bill as the Capability.

9. The Cth IMS Bill allows the Secretary to gather an extremely wide range of identifying information on individuals including names, current and former addresses, place and date of birth, sex, any information in or associated with any drivers licence or passport, any citizenship information including former citizenship, a facial image of the individual and any biometric template involving use of such an image and “any information that is prescribed by the rules and relates to the individual” (cl 5(1)). That is, the breadth of information that may be captured, interrogated, used and disclosed via this system is unconfined.
10. Further, cls 5(2) and 5(3) of the Cth IMS Bill provide that, as long as the information gathered etc is not “primarily” information of these kinds, even though it may be inferred from the information, or if the Minister prescribes rules permitting information of these kinds to be gathered etc, information may be gathered etc about an individual that is:
- racial or ethnic origin; or
 - political opinions; or
 - membership of a political association; or
 - religious beliefs or affiliations; or
 - philosophical beliefs; or
 - membership of a professional or trade association; or
 - membership of a trade union; or
 - sexual orientation or practices; or
 - criminal record;
 - health information (within the meaning of the *Privacy Act* 1988) about the individual;
 - genetic information about the individual

That is, the “Capability” may be used to amass a thorough dossier on each or any individual without satisfying any other legislative law enforcement or intelligence criterion for the exercise of such state power.

11. Even if the information gathered etc is limited to the kinds of information described in s 5(1) this will be a significant change in the operation of the Australian polity.
12. The Australian people in 1987 widely rejected the proposed introduction of an “Australia Card” identity document. There has been no wide publicisation or explanation of the proposed virtual identity card system that will be introduced by the combination of the Bill and the Cth IMS Bill. No public support or electoral mandate has been obtained for such a system.
13. There is a very significant public policy debate yet to be had as to whether a national virtual identity card system should be introduced at all or, if it is introduced, what safeguards of privacy and civil liberties should be included in any legislative scheme. The period for submissions on this Bill does not allow time for examination of the issues in such a debate. Rather, the most urgent concern is that no such debate has been had. This is a matter on which the people of NSW, indeed of Australia, could rightly expect to be informed and consulted before such measures are introduced.
14. The intention of the Cth IMS Bill is to go much further than identity checks of individuals by law enforcement or at ports of entry. The policy intention is to facilitate surveillance and facial recognition, including eventually real-time identification and location of individuals using mass CCTV surveillance of public and private spaces. It is not coincidental that in the 2017 reorganisation of Federal government departments and agencies the newly created Department of Home Affairs took over responsibility for a number of programmes and sub-agencies promoting and organising the installation of mass CCTV in state transport systems, local government areas and other settings.
15. Again, there has been no public debate of such a development.
16. The Bill imposes no limits on the use or disclosure of the identity information proposed to be passed to the Federal government.

17. The use and disclosure of identity information under the Cth IMS Bill is largely unconfined and, in substance, is left to the rule-making power of the Minister. Clause 7 will permit use by local government and private enterprise pursuant to rules to be created by the Minister.
18. Even if the proposed system is used only for the purposes of law enforcement (and the Cth IMS Bill is not so limited) that will likely have a significant adverse effect on civil liberties and the social environment. The experience of existing systems shows that it is likely such a facility will emphasise identifying, monitoring and detaining persons profiled as ‘risky’: such profiles are likely to include not only past offenders but persons considered by law enforcement as demographically more likely to offend. This is likely to lead to disproportionate targeting of indigenous Australians and other minorities selected by law enforcement for particular scrutiny. Such surveillance will have a deleterious effect on those individuals and communities and will exacerbate disadvantage of minorities and division in the Australian polity.
19. The passage of this Bill will facilitate the creation and implementation of basic tools necessary to institute and enforce authoritarian rule. There are no legislative safeguards on its use or development. Parliament and the Australian public should not be sleep-walked into such a prospect in the absence of detailed and thoughtful public debate.
20. This is not an idle or hyperbolic concern. The use of mass surveillance to operate a ‘social credit’ system in China to enforce government policy, oppress minorities, identify and locate individuals in real-time and to widely chill dissent is a present reality not a dystopian fantasy.
21. The Bill is three short clauses but has the capacity to seriously undermine our democracy and fundamental freedoms at every level: national, state, local and private.
22. I respectfully urge the Committee to recommend to the Council that the Bill not proceed without further consultation and wide public debate of its consequences.

23. Should the consultation period be extended, I would welcome any opportunity to provide more detailed submissions on the Bill.

Valerie Heath