

Standing Committee on Law and Justice

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

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Table of contents

	Terms of reference	iv
	Committee details	v
	Chair’s foreword	vi
	Key issues	Error! Bookmark not defined.
	Recommendations	vii
	Conduct of inquiry	viii
Chapter 1	Overview	1
	Reference	1
	Background and purpose of the bill	1
	Identity-matching Services Bill 2018 (Cth)	4
	Use by Roads and Maritime Services	4
	Overview of the bill’s provisions	5
Chapter 2	Key issues	7
	Concerns with identity services matching legislation	7
	Access for non-government and local government bodies	7
	Privacy safeguards	9
	Committee comment	16
Appendix 1	Submissions	19
Appendix 2	Witnesses at hearings	20
Appendix 3	Minutes	21

Terms of reference

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

1. That the Standing Committee on Law and Justice inquire into and report on the provisions of the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018.
2. That the committee report by 12 November 2018.

The terms of reference were referred to the committee by the Legislative Council on 23 October 2018 on recommendation of the Selection of Bills Committee.¹

¹ *Minutes*, NSW Legislative Council, 23 October 2018, p 3082 and *Minutes*, NSW Legislative Council, 24 October 2018, p 3118.

Committee details

Committee members

The Hon Natalie Ward MLC	Liberal Party	<i>Chair</i>
The Hon Lynda Voltz MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon David Clarke MLC	Liberal Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Adam Searle MLC	Australian Labor Party	
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Chair's foreword

The Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018 is the second bill to be referred via the Legislative Council's trial Selection of Bills Committee to the Standing Committee on Law and Justice.

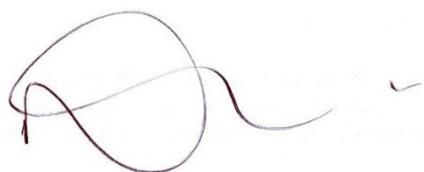
The bill seeks to amend the *Road Transport Act 2013* to authorise Roads and Maritime Services and certain other government agencies to collect, keep, use and release identity information in accordance with an Intergovernmental Agreement which was agreed to in October 2017 at a Special Meeting of the Council of Australian Governments on Counter-Terrorism. Under the agreement, agencies in all Australian jurisdictions will be able to use new identity-matching services to access passport, visa, citizenship and driver licence images.

During the short inquiry, the committee considered a number of concerns that were raised by stakeholders regarding both the Road Transport Amendment (National Facial Biometric Matching Capability) Bill and the Commonwealth's Identity-matching Services Bill 2018. This is because the Commonwealth legislation provides the overarching framework for the new biometric face-matching services.

The committee noted concerns by some stakeholders including whether there are appropriate privacy safeguards in both the NSW and Commonwealth bills.

The committee recommended that when the Legislative Council proceeds to consider the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, that stakeholder concerns raised in this inquiry be addressed by the government during debate on the bill in the Legislative Council.

On behalf of the committee, I would like to thank all who participated in the inquiry, by providing submissions and attended the public hearing at such short notice. I would also like to thank the secretariat for their assistance, including Madeleine Foley, Samuel Griffith and Lauren Evans.



Hon Natalie Ward MLC
Committee Chair

Recommendations

Recommendation 1

17

That, when the Legislative Council proceeds to consider the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, stakeholder concerns raised in this inquiry be addressed by the government during debate on the bill in the Legislative Council.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 23 October 2018 on the recommendation of the Selection of Bills Committee.

The committee received seven submissions.

The committee held one public hearing at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions and the hearing transcript.

Chapter 1 Overview

This chapter provides an overview of the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018.

Reference

- 1.1 The Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018 was introduced into the Legislative Assembly on 17 October 2018 by the Attorney General, the Hon Mark Speakman SC, MP. The bill was introduced as a cognate bill along with the Surveillance Devices Amendment (Statutory Review) Bill 2018 and Terrorism (Police Powers) Amendment (Statutory Review) Bill 2018.²
- 1.2 On 23 October 2018 the Selection of Bills Committee recommended to the Legislative Council that the provisions of the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018 be referred to the Standing Committee on Law and Justice for inquiry and report and that the bill itself be referred upon receipt from the Legislative Assembly.³
- 1.3 Later that day the Legislative Council referred the provisions of the bill to the Standing Committee on Law and Justice on the motion of the Hon Natasha Maclaren-Jones MLC, Chair of the Selection of Bills Committee.⁴
- 1.4 The next day, the bill was received from the Assembly and the Deputy President indicated that the bill now stood referred to the Standing Committee on Law and Justice.⁵

Background and purpose of the bill

- 1.5 The bill seeks to amend the *Road Transport Act 2013* to authorise Roads and Maritime Services and certain other government agencies to collect, keep, use and release identity information in accordance with an Intergovernmental Agreement⁶ which was agreed to in October 2017 at a Special Meeting of the Council of Australian Governments on Counter-Terrorism.⁷
- 1.6 At the Council of Australian Governments meeting, first Ministers entered into an Intergovernmental Agreement on Identity Matching Services to establish and participate in the National Facial Biometric Matching Capability.⁸ Under the agreement, agencies in all Australian jurisdictions will be able to use new identity-matching services to access passport, visa, citizenship and driver licence images.⁹

² *Hansard*, NSW Legislative Assembly, 17 October 2018, pp 6-12.

³ Selection of Bills Committee, NSW Legislative Council, *Report No. 15 – 23 October 2018* (2018), p 2.

⁴ *Minutes*, NSW Legislative Council, 23 October 2018, pp 3081-82.

⁵ *Minutes*, NSW Legislative Council, 24 October 2018, p 3118.

⁶ Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, p 1.

⁷ Submission 1, Department of Home Affairs, p 4.

⁸ *Hansard*, NSW Legislative Assembly, 17 October 2018, p 10 (Mark Speakman).

⁹ Submission 1, Department of Home Affairs, p 4.

- 1.7** In his second reading speech, the Attorney General indicated that the purpose of this is to 'help deter crime, prevent identity theft and provide law enforcement agencies with an investigative tool to identify people who may be associated with criminal activities'.¹⁰
- 1.8** The Commonwealth Department of Home Affairs noted the following benefits of the identity-matching services:
- preventing identity crime
 - general law enforcement
 - national security
 - protective security
 - community safety
 - road safety
 - identity verification.¹¹
- 1.9** Identity crime causes substantial harm to the economy and individuals. It impacts around one in four Australians throughout their lifetime, with an estimated annual cost of at least \$2 billion. Identity crime is also a key enabler of terrorism, with previously convicted offenders using fake identities to purchase items such as ammunition.¹²
- 1.10** While agencies can already verify information on identity documents by using the Document Verification Service, this is a name-based checking tool and cannot detect when a fraudulent photo is used with otherwise legitimate details, or assist in identifying an unknown person from a facial image.¹³
- 1.11** Current image-based methods of identifying an unknown person can also be slow, difficult to audit, and often involve manual tasking between agencies, which can take several days to process. This impedes the ability to identify a person of interest quickly. For this reason the Commonwealth Department of Home Affairs argued that the proposed identity-matching services will streamline these processes by providing authorised agencies with the means to rapidly share and match facial images.¹⁴
- 1.12** Under the Intergovernmental Agreement, authorised Commonwealth, State and Territory data holding agencies will make images and associated personal information accessible to other authorised agencies.¹⁵
- 1.13** The Capability can only be accessed or used by government agencies that:
- have a legislative basis to access to the Capability
 - are 'authorised'
 - have a lawful purpose for each instance of use.¹⁶

¹⁰ *Hansard*, NSW Legislative Assembly, 17 October 2018, p 10 (Mark Speakman).

¹¹ Submission 1, Department of Home Affairs, p 5.

¹² Submission 1, Department of Home Affairs, p 3.

¹³ Submission 1, Department of Home Affairs, pp 3-4.

¹⁴ Submission 1, Department of Home Affairs, p 4.

¹⁵ *Hansard*, NSW Legislative Assembly, 17 October 2018, p 11 (Mark Speakman).

¹⁶ Submission 5, NSW Government, p 2.

- 1.14** The Attorney General stated that in order to be 'authorised', an agency must enter into a participation agreement with the host (currently the Commonwealth Department of Home Affairs).¹⁷ The participation agreement sets out:
- all agencies' roles, rights, responsibilities and obligations
 - strict conditions for use, including what training, compliance, security and audit standards each agency must meet
 - the framework within which agencies must negotiate their data sharing and access arrangements and conditions in accordance with required privacy and security safeguards.¹⁸
- 1.15** After executing a participation agreement, an agency must then execute Participation Access Arrangements with each other government agency whose data the first agency wishes to access via the Capability. For example, Roads and Maritime Services would need to execute Participation Access Arrangements with each other jurisdiction's road agencies in order to access their images and associated personal information.¹⁹
- 1.16** Authorised law enforcement agencies will be able to use the Capability's Facial Identification Service to gain investigative leads to help identify unknown persons without their consent. The Attorney General indicated that this can only be used in limited circumstances, for the purposes of 'law enforcement, national security and community safety'.²⁰ The definition of community safety is an inclusive definition that 'covers promoting community safety, including by identifying an individual who has suffered, or is reasonably believed to be at risk of suffering, physical harm...'.²¹ When using the Facial Identification Service for 'general law enforcement' purposes, law enforcement agencies of one jurisdiction will only be able to search the images and associated personal information of other jurisdictions where the investigation concerns an offence carrying a maximum penalty of not less than three years' imprisonment.²²
- 1.17** Other authorised government agencies such as Roads and Maritime Services, will be able to use the Capability's Facial Verification Service to verify the identities of people they deal with. It will allow members of the community, with their consent, to quickly have their identities verified when engaging with government, for example, when renewing driver licences. In limited circumstances the agencies can access this information without consent, such as to ensure an individual is not seeking multiple licences in multiple names.²³
- 1.18** The Commonwealth Department of Home Affairs stated that the identity-matching services will be delivered via an 'interoperability hub' that enables data-sharing between agencies on a query and response basis, without storing any personal information. Driver licence images will

¹⁷ *Hansard*, NSW Legislative Assembly, 17 October 2018, p 11 (Mark Speakman).

¹⁸ Submission 5, NSW Government, p 2.

¹⁹ Submission 5, NSW Government, pp 2-3.

²⁰ Submission 5, NSW Government, p 1; *Hansard*, NSW Legislative Assembly, 17 October 2018, p 11 (Mark Speakman).

²¹ Section 6(6), Identity-matching Services Bill 2018 (Cth).

²² Submission 5, NSW Government, p 1.

²³ Submission 5, NSW Government, p 1; *Hansard*, NSW Legislative Assembly, 17 October 2018, p 11 (Mark Speakman).

be made available by the establishment of a National Driver Licence Facial Recognition Solution, hosted by the Commonwealth.²⁴

- 1.19** Queensland, Tasmania, Victoria and South Australia have already enacted legislation to facilitate the implementation of the Intergovernmental Agreement.²⁵ However, the overarching Commonwealth legislation has not passed the Federal Parliament.²⁶

Identity-matching Services Bill 2018 (Cth)

- 1.20** On 7 February 2018 the Minister for Home Affairs introduced the Identity-matching Services Bill 2018 into the Commonwealth Parliament.²⁷ The bill does a range of things, including:

- authorising the Commonwealth Department of Home Affairs to develop, operate and maintain the Interoperability Hub and the National Driver Licence Facial Recognition Solution
- authorising the Department of Home Affairs to create and maintain facilities for the sharing of facial images and other identity information between government agencies, and in some cases, private organisations
- setting out the identity-matching services to be implemented as part of the Intergovernmental Agreement on Identity Matching Services.²⁸

- 1.21** In March 2018, the bill was referred to the Parliamentary Joint Committee on Intelligence and Security for inquiry and review. The bill is still being considered by that committee.²⁹

- 1.22** The Parliamentary Joint Committee on Human Rights considered the bill in its human rights scrutiny report numbers 3 and 5 of 2018. The Senate Standing Committee for the Scrutiny of Bills also considered the bill in its Scrutiny Digest report numbers 2 and 5 of 2018.³⁰

- 1.23** The bill has not yet passed the Commonwealth Parliament. This report is written having reference to the terms of the bill as first printed and read. This may not be the final form of the bill which is subject to potential amendments and further debate.

Use by Roads and Maritime Services

- 1.24** During evidence NSW Government witnesses indicated that at the present stage Roads and Maritime Services has no plans to access or use the Capability, only to provide information to

²⁴ Submission 1, Department of Home Affairs, p 5.

²⁵ Submission 1, Department of Home Affairs, p 7.

²⁶ Submission 1, Commonwealth Department of Home Affairs, p 5.

²⁷ Submission 1, Commonwealth Department of Home Affairs, p 5.

²⁸ Submission 1, Commonwealth Department of Home Affairs, p 6.

²⁹ Submission 1, Commonwealth Department of Home Affairs, p 6.

³⁰ Submission 1, Commonwealth Department of Home Affairs, p 6.

the hub. However, the witnesses noted that in the future the agency may consider signing up to the One Person One Licence Service (OPOLS).³¹

1.25 OPOLS is another identity-matching service envisaged under the Intergovernmental Agreement which will be available to assist States in upholding the integrity of driver licence and other identification systems.³²

1.26 Mr Patrick Seedsman, Senior Legal Counsel at Roads and Maritime Services noted that while Roads and Maritime Services already has a facial recognition system, OPOLS may be a useful tool to detect fraud:

RMS has used its own facial recognition system for many years to detect fraud but RMS' system is limited to comparing a customer's image against RMS' own photo database. OPOLS, however, would permit RMS to check an image against driver licence images of other road agencies too and so OPOLS would allow RMS to prevent fraud by checking whether a customer holds a driver licence in another jurisdiction under another name. Should RMS choose to use OPOLS then it is conceivable that it could be used at the point in time when the customer attends a service centre to have their photo taken for their licence.³³

Overview of the bill's provisions

1.27 The objects of the bill, as set out in the explanatory note, are to authorise Roads and Maritime Services and certain other NSW Government agencies:

- to release photographs and associated personal information to the National Facial Biometric Matching Capability, and
- to collect photographs and associated personal information from the Capability and to keep and use those photographs or that information for any lawful purpose in connection with the exercise of the agency's functions.³⁴

1.28 The bill will amend the *Road Transport Act 2013* to allow Roads and Maritime Services to contribute driver licence facial images and associated personal information for searching within the Capability. These amendments are required to facilitate the operation of the Capability as the Act currently includes strict conditions around how facial images and associated personal information are collected, stored, used and disclosed.³⁵

1.29 The bill comprises a single Schedule which:

- authorises Roads and Maritime Services and other authorised government agencies to collect photographs and associated personal information from the Capability

³¹ Evidence, Mr Patrick Seedsman, Senior Legal Counsel, Roads and Maritime Services, 7 November 2018, p 15; Evidence Mr Justin Griffith, Director IT, Strategy and Architecture, Roads and Maritime Services, 7 November 2018, p 15.

³² Submission 1, Commonwealth Department of Home Affairs, p 5.

³³ Evidence, Mr Seedsman, 7 November 2018, p 13.

³⁴ Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, Explanatory Notes, p 1.

³⁵ *Hansard*, NSW Legislative Assembly, 17 October 2018, p 11 (Mark Speakman).

- authorises Roads and Maritime Services and other authorised government agencies to release photographs and associated personal information they hold to the Capability
- authorises Roads and Maritime Services and other authorised governmental agencies to keep and use photographs and associated personal information obtained from or disclosed to them via the Capability
- specifies that ss 9 and 10 of the *Privacy and Personal Information Protection Act 1998* do not apply to photographs and personal information collected by an authorised government agency from the Capability³⁶
 - Section 9 provides that a public sector agency must collect personal information directly from the relevant individual unless the individual consents otherwise. The nature of the Capability would make it impossible for Roads and Maritime Services to comply with this section³⁷
 - Section 10 states that an agency must take such steps as are reasonable to provide customers with a privacy statement or personal information collection notice providing information about the collection of information. Compliance with s 10 is not possible where images are uploaded to the Capability rather than being directly collected by the agency.³⁸

1.30 The NSW Government advised that Roads and Maritime Services will update its Privacy Statements to inform customers about its participation in the Capability.³⁹

1.31 The NSW Government also noted that Roads and Maritime Services' customer service functions, including issuing driver licences and registering vehicles, are carried out by Service NSW. The reference to 'agent' in the bill is therefore intended to capture Service NSW when it performs Roads and Maritime Services' functions.⁴⁰

³⁶ Submission 5, NSW Government, p 4.

³⁷ Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, p 3; *Hansard*, NSW Legislative Assembly, 17 October 2018, pp 11-12 (Mark Speakman).

³⁸ Submission 5, NSW Government, p 4.

³⁹ Submission 5, NSW Government, p 4.

⁴⁰ Submission 5, NSW Government, p 3.

Chapter 2 Key issues

This chapter outlines the key issues raised by inquiry participants in relation to the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018 and the Commonwealth's Identity-matching Services Bill 2018 and responses to these concerns.

Concerns with identity services matching legislation

- 2.1 Evidence from stakeholders focused on both the Road Transport Amendment (National Facial Biometric Matching Capability) Bill and the Commonwealth's Identity-matching Services Bill 2018. This is because the Commonwealth legislation provides the overarching framework for the new biometric face-matching services. It is therefore important to consider the Commonwealth bill when discussing the Road Transport Bill.
- 2.2 The NSW Council for Civil Liberties, Australian Lawyers for Human Rights and the Law Society of New South Wales all raised concerns with the legislation, including that:
- facilitates the ability to provide information to local government and non-government bodies and is inconsistent with the Intergovernmental Agreement on Identity Matching Services
 - contains ineffective privacy safeguards
 - could be seen as creating a virtual identity card and may facilitate profiling.⁴¹
- 2.3 These issues will be considered in turn in the following section.

Access for non-government and local government bodies

- 2.4 While the NSW Council for Civil Liberties agreed that the power to rapidly check the identity of an unidentified person of interest in a terrorist or public safety context is justified and proportionate, it argued that the current proposal goes well beyond these circumstances, with access 'provided to a broad range of government, local government and non-government entities for a wide range of non-urgent purposes'.⁴²
- 2.5 It indicated that the Commonwealth bill is open-ended regarding local government and non-government use of the service. The bill states that these bodies can use all identity matching services, if 'verification of the individual's identity is reasonably necessary for one or more of the functions or activities of the local government authority or non-government entity'. This broadens access to the Face Verification Service from what was agreed to in the Intergovernmental Agreement. The Agreement stated that a private sector organisation must have a legislative basis or authority to access the Facial Verification Service.⁴³

⁴¹ Submission 4, NSW Council for Civil Liberties, p 3; Submission 7, Australian Lawyers for Human Rights; Submission 6, The Law Society of New South Wales, p 2; Submission 3, Ms Valerie Heath, Legal practitioner, p 3.

⁴² Submission 4, NSW Council for Civil Liberties, p 4.

⁴³ Submission 4, NSW Council for Civil Liberties, p 7.

2.6 The council therefore concluded that the Road Transport Bill should not proceed until 'major anomalies' between the Commonwealth bill and Intergovernmental Agreement have been resolved.⁴⁴ It noted that Victoria and the ACT have not put forward corresponding legislation, reportedly because of privacy concerns regarding the sharing of information with non-government bodies.⁴⁵

2.7 The Law Society also stated its strong opposition to information being made available for commercial purposes.⁴⁶

Response to concerns

2.8 Mr Andrew Rice, Acting First Assistant Secretary, Identity and Biometrics Division, Department of Home Affairs explained that a non-government organisation, such as a bank, could never access the Facial Identification Service as this is for law enforcement purposes as prescribed by law. However a non-government organisation could gain access to the Facial Verification Service.⁴⁷

2.9 Access would however be limited to a query and response. An organisation would be able to query whether the information it had in relation to a person is the same as the information in the system. The organisation would only receive a yes/no response and would not be privy to further data on the individual.⁴⁸ Mr Rice elaborated:

... they have the ability to pose a query. They have already captured the sensitive personal information and they have the ability to query the system and receive a yes or no answer. They do not receive that my mum's maiden name was X, they just get a yes or no answer.⁴⁹

2.10 Mr Rice confirmed that there were arrangements in place that allowed in some instances for private agents to be granted direct access to the interoperability hub as brokers. These private agents would then field queries from other private entities such as banks and provide an answer to them whether or not the Capability identified the person as the person asserted.⁵⁰

2.11 Mr Patrick Seedsman, Senior Legal Counsel, Roads and Maritime Services stated that 'each agency has ultimate control over what other agency accesses its data in the hub'.⁵¹ So a bank would need to make an application to Roads and Maritime Services to access its data. It is not a foregone conclusion that the bank would have access to the information.⁵²

⁴⁴ Submission 4, NSW Council for Civil Liberties, p 8.

⁴⁵ Submission 4, NSW Council for Civil Liberties, p 7.

⁴⁶ Submission 7, Australian Lawyers for Human Rights, p 3.

⁴⁷ Evidence, Mr Andrew Rice, Acting First Assistant Secretary, Identity and Biometrics Division, Department of Home Affairs, 7 November 2018, p 19.

⁴⁸ Evidence, Mr Rice, 7 November 2018, p 19.

⁴⁹ Evidence, Mr Rice, 7 November 2018, p 23.

⁵⁰ Evidence, Mr Rice, 7 November 2018, p 23.

⁵¹ Evidence, Mr Patrick Seedsman, Senior Legal Counsel, Roads and Maritime Services, 7 November 2018, p 15.

⁵² Evidence, Mr Seedsman, 7 November 2018, p 22.

- 2.12** The Information and Privacy Commission NSW advised that the Intergovernmental Agreement details the terms applicable for access by non-government organisation to the Facial Verification Service, including:
- searching or matching of facial image records on a ‘one to one’ basis to help verify an individual’s identity
 - a ‘match’ or ‘no match’ response to queries as to whether an individual’s facial image and purported identity match a relevant government record
 - use must be compliant with the *Privacy Act 1988* (Cth), relevant state and territory privacy legislation and/or other applicable legislation
 - an organisation must comply with the requirements of the participation agreement, including the Facial Verification Service Access Policy developed by the Coordination Group.⁵³
- 2.13** Mr Rice noted that the Victorian Government provided a submission to the Parliamentary Joint Committee on Intelligence and Security which raised some concerns with private sector access. He noted that the department responded that the 'bill was about futureproofing ... and it is still a decision for all the governments of Australia as to whether the private sector gets access to driver licences'.⁵⁴ He noted that he is in close contact with Victorian Premier's department officials 'who have been at pains to say they are still with us and, indeed, are very close to being brought into our technical program for integration of their images'.⁵⁵

Privacy safeguards

- 2.14** The Australian Lawyers for Human Rights agreed with the aim of allowing identity-matching services to be used by government where there is a question of wrongdoing, while noting that such services must be surrounded by safeguards. It considered that insufficient safeguards have been adopted at the Commonwealth level, and no safeguards have been included in the Road Transport Bill.⁵⁶
- 2.15** It argued that legislation which impinges upon human rights must be 'narrowly framed and proportionate to the relevant harm it addresses'. The Australian Lawyers for Human Rights indicated that in their view the Commonwealth bill does not strike the correct balance, and New South Wales should not provide information 'to be used for unspecified possibly commercial purposes through the hub or the Capability'.⁵⁷
- 2.16** Further, the Australian Lawyers for Human Rights argued that the Road Transport Bill should not be passed as it opens New South Wales citizens up to government surveillance:

The Federal Bills exempt the Federal Government from the normal operations of the Australian privacy principles and allow individuals’ personal and sensitive information,

⁵³ Correspondence, Information and Privacy Commission NSW, 8 November 2018, p 1.

⁵⁴ Evidence, Mr Rice, 7 November 2018, p 19.

⁵⁵ Evidence, Mr Rice, 7 November 2018, p 20.

⁵⁶ Submission 7, Australian Lawyers for Human Rights, p 2.

⁵⁷ Submission 7, Australian Lawyers for Human Rights, p 10.

including biometric data to be used for any purpose the Federal Government may wish. The Federal Bills do not respect privacy but enable surveillance and exploitation. NSW residents should not be made part of these arrangements.⁵⁸

- 2.17** Australian Lawyers for Human Rights was also concerned that under both the State and Commonwealth bills data can be obtained for one purpose, but used for other purposes:

It is a fundamental aspect of the Australian Privacy Principles that individuals should know the reason for collection of their personal information and that the information should be used only for that particular purpose or purposes. This fundamental concept is not honoured by the Identity-Matching Services Bill, which indeed specifically provides that data obtained for one purpose can be used for other purposes, with section 3 providing that: 'The Department may use or disclose for any of those purposes information so collected (regardless of the purpose for which it was collected)' (emphasis added). The information may also be shared with other countries, amounting to a substantial breach of personal privacy.⁵⁹

- 2.18** The Law Society was also concerned about the scope and reach of the Capability and the associated risks of unnecessary encroachment on the privacy of citizens. It stated that the Road Transport Bill does not include any assurances as to what controls or safeguards will operate to protect the personal information shared to the Capability.⁶⁰ It recommended that the Road Transport Bill not proceed until a thorough public Privacy Impact Assessment is undertaken by the NSW Privacy Commissioner.⁶¹

- 2.19** During evidence, Dr Lesley Lynch, the Vice President of the NSW Council for Civil Liberties noted that while she was assured the Capability will not be used for 'general mass surveillance' at this stage, it does provide the building blocks for close to real-time mass surveillance by government which could have very negative effects for our democracy:

The transformational element in the overall surveillance agenda is then enhanced capacity for close to real-time matching of unidentified facial images against a growing and eventually pretty large national database. The sources for these images, as we know, are many. CCTV is almost everywhere we go now; almost everybody has their own phone in their hands most of the time, their iPhone and so on and so on. This delivers a technical capacity for real-time mass surveillance of public gatherings as well as the terrorist and other public safety incidents.

...

If we are putting into place a capability which gives government the capacity for real-time surveillance, it is big stakes. And it is big stakes not just in terms of people's privacy; it is big stakes in terms of the nature of our democracy. I think it is a pretty incontrovertible historical fact that if you have that kind of surveillance you have a profound chilling effect on people's willingness to go to a demonstration if you know you could be picked up.⁶²

⁵⁸ Submission 7, Australian Lawyers for Human Rights, p 1.

⁵⁹ Submission 7, Australian Lawyers for Human Rights, p 6.

⁶⁰ Submission 6, The Law Society of New South Wales, p 3.

⁶¹ Submission 6, The Law Society of New South Wales, p 4.

⁶² Evidence, Dr Lesley Lynch, Vice President, NSW Council for Civil Liberties, 7 November 2018, p 3 and p 6.

- 2.20** Dr Lynch stated that all aspects of the national database and the identity-matching and identification capabilities should be very tightly controlled to give maximum protection to the privacy of individuals who are not police suspects.⁶³
- 2.21** The NSW Council for Civil Liberties asserted that there are no robust privacy safeguards in the Commonwealth bill and that there are weaknesses in the New South Wales privacy framework.⁶⁴ It recommended that the Road Transport Bill not proceed until the Commonwealth bill is amended to include robust privacy safeguards.⁶⁵ The council also considered that the Road Transport Bill should be subject to independent review every three years.⁶⁶
- 2.22** The NSW Council for Civil Liberties also noted the substantial rule making power in the Commonwealth bill provided to the Minister for Home Affairs. The council argued that rules which have a significant impact on individual rights and liberties should be included in primary legislation. By deferring important decisions to delegated legislation, the level of scrutiny is reduced because there is little parliamentary oversight.⁶⁷
- 2.23** The NSW Council for Civil Liberties recommended that the Road Transport Bill should not proceed until the Commonwealth Act is amended to ensure that rules which will have adverse effects on individual liberties or rights cannot be made by the Minister for Home Affairs.⁶⁸
- 2.24** Stakeholders also expressed concerns about the timing of the Road Transport Bill. The NSW Council for Civil Liberties argued that it seemed 'premature to pass cognate legislation at a State level when the precise parameters of the Face Matching Service and much other detail, have not been settled within the main legislation'.⁶⁹
- 2.25** The Law Society also expressed concern that the Road Transport Bill is being advanced ahead of the passage of the Commonwealth enabling legislation.⁷⁰ It noted that the bill is proposed to commence on assent, potentially ahead of the commencement of the Commonwealth bill and associated privacy and security safeguards foreshadowed in the Intergovernmental Agreement.⁷¹
- 2.26** The NSW Council for Civil Liberties and The Law Society both considered that the Road Transport Bill should not proceed until the Commonwealth bill has been enacted.⁷²

Virtual identity card

- 2.27** Some inquiry stakeholders likened the Capability to a virtual identity card. The NSW Council for Civil Liberties informed the committee that this proposal has quietly evolved over the last decade following failed attempts by governments to introduce identity cards in Australia:

⁶³ Evidence, Dr Lynch, 7 November 2018, p 3.

⁶⁴ Submission 4, NSW Council for Civil Liberties, p 9.

⁶⁵ Submission 4, NSW Council for Civil Liberties, p 10.

⁶⁶ Submission 4, NSW Council for Civil Liberties, p 10 and p 13.

⁶⁷ Submission 4, NSW Council for Civil Liberties, p 11.

⁶⁸ Submission 4, NSW Council for Civil Liberties, p 11.

⁶⁹ Submission 4, NSW Council for Civil Liberties, p 7.

⁷⁰ Submission 6, The Law Society of New South Wales, p 3.

⁷¹ Submission 6, The Law Society of New South Wales, p 3.

⁷² Submission 4, NSW Council for Civil Liberties, p 7.

This proposal is not a sudden development. It is the latest iteration in the development of a national facial recognition identity framework and system which have quietly evolved over the last decade or so. In 1987 and in 2006 the Federal Government attempted to implement national identity schemes – most memorably, the Australia Card and then the Access Card. These aimed to provide administrative efficiency but the perceived threat of increased government monitoring and surveillance and loss of privacy and the right to anonymity generated solid resistance from civil society. Neither was implemented and it was reasonable to assume that, given the strength of community opposition, future Governments would be wary of trying again.⁷³

- 2.28** The NSW Council for Civil Liberties argued that the 'combined scope and capacity of this national identity matching framework will provide a far more powerful identification and surveillance tool than would have been delivered by the Australia Card'.⁷⁴
- 2.29** Legal practitioner Ms Valerie Heath noted that in 1987 the Australian people rejected the proposed introduction of an Australia Card identity document. She stated that the introduction of a 'national virtual identity card system' is significant, and there should be a wider public policy debate to discuss the ramifications.⁷⁵
- 2.30** The Australian Lawyers for Human Rights also indicated that the arrangements in these bills are being advanced 'with no real public consultation, despite the well-known opposition of a majority of Australians to any national identity card system'.⁷⁶

Profiling

- 2.31** Some inquiry participants noted their unease that the incidental collection of certain biometric data may lead to the Capability being used for racial profiling.
- 2.32** Ms Valerie Heath observed that the experience of existing systems shows that it is likely such a facility will emphasise identifying, monitoring and detaining persons profiled as 'risky' and will include persons considered by law enforcement as demographically more likely to offend, leading to 'disproportionate targeting of indigenous Australians and other minorities selected by law enforcement for particular scrutiny'.⁷⁷
- 2.33** The NSW Council for Civil Liberties indicated that the Commonwealth bill specifically permits the collection of sensitive information. While this excludes the collection of information regarding racial or ethnic origin, health information and genetic information, the incidental collection, use or disclosure of this information is in fact permitted. The council explained that 'biometric information, by its nature, captures information about a person's health, ethnicity and race and for that reason has been linked to inappropriate profiling'.⁷⁸
- 2.34** The NSW Council for Civil Liberties recommended that the bill not proceed until the Commonwealth bill has been amended to include a robust compliance framework, including

⁷³ Submission 4, NSW Council for Civil Liberties, p 5.

⁷⁴ Submission 4, NSW Council for Civil Liberties, p 6.

⁷⁵ Submission 3, Ms Valerie Heath, Legal practitioner, p 4.

⁷⁶ Submission 7, Australian Lawyers for Human Rights, p 2.

⁷⁷ Submission 3, Ms Valerie Heath, Legal practitioner, p 5

⁷⁸ Submission 4, NSW Council for Civil Liberties, p 9.

transparency, independent vulnerability tests and mechanisms for responding to public complaints.⁷⁹

Response to concerns with the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

2.35 The Attorney General, Mr Mark Speakman SC, MP, addressed privacy concerns with the Road Transport Bill in his second reading speech. Mr Speakman stated that the Capability includes robust privacy safeguards, a compliance framework and independent oversight:

I reiterate previous statements from the New South Wales and Commonwealth governments that the Capability has been designed and built with robust privacy safeguards in mind, has been subject to detailed privacy impact assessments and data security assessments, will only be accessible by authorised agencies and by individuals within those agencies who are also appropriately authorised and have undertaken required training, and will be subject to a robust compliance framework and independent oversight at both the New South Wales and national level.⁸⁰

2.36 The NSW Government indicated that the Capability has been designed with robust privacy safeguards:

- each agency authorised to use the identity matching services will be bound by strict conditions about their use of the Capability
- the *Privacy and Personal Information Protection Act 1998* continues to apply, with the exclusion of ss 9 and 10
- the Capability has strict authorisation, audit and training requirements; an established compliance framework to identify and manage misuse; and clear conditions on the parameters of permissible use of the different services within the Capability
- data would not be available to the private sector without the prior approval of the NSW Government.⁸¹

2.37 The Information and Privacy Commission supported the government's views that the Capability was designed to include robust privacy safeguards. The commission indicated that it had been consulted by the Commonwealth and NSW Governments about the development of the Capability, the National Driver Licence Facial Recognition Solution, and the legislation.⁸²

2.38 The commission noted its in-principle support for the bill's objectives, subject to appropriate privacy and security controls, and considered 'that the bill operates within the framework of relevant legislation and the State's privacy regime, including the requirement for legislative authority to collect, use and disclose facial images and other personal information'.⁸³

⁷⁹ Submission 4, NSW Council for Civil Liberties, p 10.

⁸⁰ *Hansard*, NSW Legislative Assembly, 17 October 2018, p 12 (Mark Speakman).

⁸¹ Submission 5, NSW Government, p 3.

⁸² Submission 2, Information and Privacy Commission, p 2.

⁸³ Submission 2, Information and Privacy Commission, p 3.

- 2.39** The commission supported the exemptions to the *Privacy and Personal Information Protection Act 1998* proposed by the bill in order to facilitate New South Wales' participation in the Capability.⁸⁴
- 2.40** The Information and Privacy Commission also argued that under the *Government Information (Public Access) Act 2009* (GIPA Act) there is a general public interest in favour of the disclosure of government information⁸⁵ and submitted that the policy objectives in the bill are consistent with the object of the GIPA Act and the public interest.⁸⁶

Response to concerns with the Identity-matching Services Bill 2018 (Cth)

- 2.41** Stakeholders also addressed concerns with the Commonwealth legislation. The Commonwealth Department of Home Affairs explained that the identity-matching services outlined in the Identity-matching Services Bill 2018 (Cth) have been informed by a 'Privacy by Design' approach, with a range of privacy safeguards built-in throughout the bill, as well as policy and administrative arrangements that will support the services. The department advised that all jurisdictions have been involved in developing these safeguards and will be expected to implement the policy and administrative measures.⁸⁷
- 2.42** Ms Samantha Gavel, the NSW Privacy Commissioner, outlined the extensive consultation that has taken place on the Commonwealth legislation:

It has gone on over a number of years ... The most recent one that I was involved in was in about March this year, a roundtable of privacy commissioners with the Department of Home Affairs to look more closely at some of the compliance documentation that underpins the scheme and also to have input into the latest privacy impact assessment that has been done. There have already been two done, as I understand it.⁸⁸

- 2.43** The Commonwealth Department of Home Affairs submitted that the Commonwealth bill has a range of privacy, accountability and transparency measures to ensure appropriate safeguards exist in relation to the use of identification information in the delivery of identity-matching services, including:
- restricting the kinds of identification information that can be collected, used or disclosed
 - defining and limiting the scope of the identity-matching services that can be provided by Home Affairs
 - limiting the purposes for which Home Affairs may collect, use or disclose identification information to prescribed identity and community protection activities
 - establishing an offence for unauthorised recording and disclosure of information by entrusted persons

⁸⁴ Submission 2, Information and Privacy Commission, p 4.

⁸⁵ Submission 2, Information and Privacy Commission, p 4.

⁸⁶ Submission 2, Information and Privacy Commission, p 5.

⁸⁷ Submission 1, Commonwealth Department of Home Affairs, p 7.

⁸⁸ Evidence, Ms Samantha Gavel, NSW Privacy Commissioner, NSW Information and Privacy Commission, 7 November 2018, p 9.

- requiring the Minister to submit a report to Parliament on the use of the services each year.⁸⁹

2.44 According to the department, the Facial Identification Service is subject to particular privacy safeguards in the Commonwealth bill, including:

- limiting its use to a specific list of Commonwealth, State and Territory national security, law enforcement and anti-corruption agencies
- providing that it can only be used for the purposes of preventing and detecting identity fraud, law enforcement, national security, protective security and community safety.⁹⁰

2.45 The participation agreements (outlined in Chapter 1) also provides a framework within which agencies will negotiate details of data sharing arrangements, so that these arrangements meet minimum privacy and security safeguards in order to support information sharing across jurisdictions. The Commonwealth Department of Home Affairs explained that it will not have the ability to access driver licence or other identity information provided by states and territories, other than through the agreed data sharing arrangements.⁹¹

2.46 The department informed the committee that, together with the Intergovernmental Agreement, these agreements include additional privacy protections that participating agencies need to comply with before obtaining access to the services, including:

- providing a statement of the legislative authority or basis on which an agency may obtain identity information through the face-matching services
- conducting a privacy impact assessment which includes consideration of the entity's use of the identity-matching services
- entering into arrangements for the sharing of identity information with each data-holding agency it wishes to receive information from
- providing appropriate training to personnel involved
- conducting annual compliance audits.⁹²

2.47 In addition to the privacy safeguards, the Commonwealth Department of Home Affairs will remain subject to the *Privacy Act 1988* (Cth) and the Australian Privacy Principles in relation to personal information that it collects, uses or discloses. This includes being subject to the Notifiable Data Breaches scheme under the *Privacy Act*, as administered by the Office of the Australian Information Commissioner.⁹³

2.48 In responding to questions concerning 'bundled consent', Mr Rice committed to the Department of Home Affairs working with Federal and State colleagues to put in place appropriate consent arrangements, through the participation agreements.⁹⁴

⁸⁹ Submission 1, Commonwealth Department of Home Affairs, pp 7-8.

⁹⁰ Submission 1, Commonwealth Department of Home Affairs, p 8.

⁹¹ Submission 1, Commonwealth Department of Home Affairs, p 8.

⁹² Submission 1, Commonwealth Department of Home Affairs, p 8.

⁹³ Submission 1, Commonwealth Department of Home Affairs, p 8.

⁹⁴ Evidence, Mr Rice, 7 November 2018, p 22.

- 2.49** In answering the committee about what purposes will Roads and Maritime Services be using the information obtained from the capability, Mr Seedsman responded that it was his understanding that Roads and Maritime Services does not have any present proposal to use information from the Capability.⁹⁵

Committee comment

- 2.50** Stakeholders were united in the view that the facial matching capability for the purposes of law enforcement, such as in the event of a terrorist attack or a siege situation, is a sensible and important measure.
- 2.51** However, the committee acknowledges stakeholder concerns raised during this inquiry. This process has provided an important opportunity for these matters to be aired and for government representatives to respond.
- 2.52** The committee notes that the Commonwealth bill potentially allows non-government organisations such as banks to access the Facial Verification Service. However, we note that this access would be limited to a query and response process and would not allow the organisation to access personal information it was not already privy to.
- 2.53** The committee acknowledges that the Commonwealth legislation has not yet passed and there is some uncertainty about what, if any, amendments may be made to it.
- 2.54** Many concerns were also raised that the bills provide inadequate privacy safeguards. On this issue, the committee notes that the participation agreement and policy framework surrounding the New South Wales and Commonwealth legislation form a major part of the privacy safeguards. In addition, extensive dialogue has been undertaken at all levels of government in developing this framework. Further the interoperability hub provides many of the same services as the current Document Verification Service. However it is much faster, more accountable and allows for the cross-checking of images.
- 2.55** Therefore the committee notes that the Legislative Council will proceed to debate the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, but that the government should use this opportunity to address key concerns raised by stakeholders.
- 2.56** We therefore recommend that when the Legislative Council proceeds to consider the bill that stakeholder concerns raised in this inquiry be addressed by the government during debate on the bill, primarily:
- the reasons why the Road Transport Bill is being considered before the Commonwealth legislation passes
 - whether specific privacy safeguards should be included in the Road Transport Bill
 - whether New South Wales will allow its agencies to enter into participation agreements with local government and non-government bodies.

⁹⁵ Evidence, Mr Seedsman, 7 November 2018, p 15.

Recommendation 1

That, when the Legislative Council proceeds to consider the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018, stakeholder concerns raised in this inquiry be addressed by the government during debate on the bill in the Legislative Council.

Appendix 1 Submissions

No	Author
1	Department of Home Affairs
2	Information and Privacy Commission NSW
3	Ms Valerie Heath
4	NSW Council for Civil Liberties
5	NSW Government
6	The Law Society of New South Wales
7	Australian Lawyers for Human Rights

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Wednesday 7 November 2018, Jubilee Room, Parliament House, Sydney	Ms Elizabeth Tydd	NSW Information Commissioner
	Ms Samantha Gavel	NSW Information Commissioner
	Dr Lesley Lynch	Vice President, NSW Council for Civil Liberties
	Ms Michelle Falstein	Convenor of NSW Council for Civil Liberties Privacy Action Group
	Mr Patrick Seedsman	Senior Legal Counsel, Roads and Maritime Services
	Mr Justin Griffith	Director IT, Roads and Maritime Services
	Mr Mark Jenkins	Assistant Commissioner, NSW Police Force
	Mr Andrew Rice	First Assistant Secretary - Identity and Biometrics Division, Department of Home Affairs
Mr Steve Webber	Assistant Secretary - National Security & Law Enforcement Legal, Department of Home Affairs	

Appendix 3 Minutes

Minutes no. 34

24 October 2018

Standing Committee on Law and Justice

Members' Lounge, Parliament House, Sydney, 1.03 pm

1. Members present

Mrs Ward, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Martin (substituting for Mr Khan)

Mr Mookhey

Mr Shoebridge

2. Correspondence

Received

- 24 October 2018 – Letter from the Hon Natasha Maclaren-Jones MLC, to secretariat, advising that the Hon Taylor Martin MLC will be substituting for the Hon Trevor Khan MLC for the meeting to adopt terms of reference for the inquiry into the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018

3. Inquiry into the Road Transport Amendment (National Facial Biometrics Matching Capability) Bill 2018

3.1 Terms of reference

Committee noted the referral on 23 October 2018 of the following terms of reference that:

- a) the provisions of the Road Transport Amendment (National Facial Biometric Matching Capability) Bill 2018 be referred to the Standing Committee on Law and Justice for inquiry and report,
- b) the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly, and
- c) the committee report by 12 November 2018.

3.2 Proposed timeline

Resolved, on the motion of Ms Voltz: That, the committee adopt the following timeline for the administration of the inquiry:

- Wednesday 7 November 2018 – 2 hour hearing, 2 – 4 pm (unless a room can be made available 1 – 3 pm)
- Friday 9 November 2018 – Chair's draft report circulated to committee
- Monday 12 November 2018 – report deliberative 12 pm, dissenting statements due 1 hour after the minutes are circulated
- Monday 12 November 2018 – table report in accordance with resolution of the House.

3.3 Closing date for submissions

Resolved, on the motion of Mr Clarke: That the closing date for submissions be 5 pm, Friday 2 November 2018.

3.4 Stakeholder and witness list

Resolved, on the motion of Mr Shoebridge: That the following list of stakeholders be invited to make a submission and be invited to appear as witnesses at the hearing on Wednesday 7 November 2018, and that members have until 5 pm 24 October 2018 to provide additional stakeholders:

- Attorney General, Department of Justice
- Roads and Maritime Services
- Law Society of NSW
- NSW Bar Association
- NSW Council for Civil Liberties
- NSW Privacy Commissioner
- Public Interest Advocacy Centre.

3.5 Advertising

The committee noted that the inquiry will be advertised via Twitter, Facebook, stakeholder letters and a media release distributed to all media outlets in New South Wales.

3.6 Conduct of the inquiry

The committee noted the short time frame of the inquiry.

Resolved, on the motion of Mr Clarke: That there be no questions on notice asked at the public hearing on Wednesday 7 November 2018, or supplementary questions submitted after the hearing.

The committee noted that it is proposed that due to the short time frame of the inquiry, the report consist of short sections of analysis and comment, and include the transcript of evidence as an appendix.

4. Adjournment

The committee adjourned at 1.09 pm until Wednesday 7 November 2018.

Madeleine Foley
Committee Clerk

Minutes no. 35

Wednesday 7 November
Standing Committee on Law and Justice
Jubilee Room, Parliament House, 1.55 pm

1. Members present

Mrs Ward, Chair
Ms Voltz, Deputy Chair
Mr Clarke
Mr Shoebridge
Mr Farlow (substituting for Mr Khan)

2. Apologies

Mr Searle

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

3.1 Submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1 – 7.

3.2 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Elizabeth Tydd, NSW Information Commissioner
- Ms Samantha Gavel, NSW Privacy Commissioner
- Dr Lesley Lynch, Vice President, NSW Council for Civil Liberties
- Ms Michelle Falstein, Convenor of NSW Council for Civil Liberties Privacy Action Group

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Patrick Seedsman, Senior Legal Counsel, Roads and Maritime Services
- Mr Justin Griffith, Director IT, Roads and Maritime Services
- Mr Mark Jenkins, Assistant Commissioner, NSW Police Force
- Mr Andrew Rice, First Assistant Secretary - Identity and Biometrics Division, Department of Home Affairs
- Mr Steve Webber, Assistant Secretary - National Security & Law Enforcement Legal, Department of Home Affairs

Mr Rice tendered the following documents:

- The DVS network diagram
- "Hub diagram"

The evidence concluded and the witnesses withdrew.

The public and the media withdrew.

The public hearing concluded at 4.00 pm.

3.3 Tendered documents

Resolved, on the motion of Mr Shoebriidge: That the committee accept and publish the following documents tendered during the public hearing:

- The DVS network diagram by Mr Andrew Rice, First Assistant Secretary - Identity and Biometrics Division, Department of Home Affairs
- "Hub diagram" by Mr Andrew Rice, First Assistant Secretary - Identity and Biometrics Division, Department of Home Affairs.

4. Previous minutes

Resolved, on the motion of Ms Voltz: That draft minutes no. 34 be confirmed.

5. Correspondence

The Committee noted the following items of correspondence:

Received

- 25 October 2018 – Email from the Hon Shaoquett Moselmane MLC, to secretariat, advising that the Hon Adam Searle MLC will be substituting for the Hon Daniel Mookhey MLC for the duration of the inquiry
- 29 October 2018 – Email from Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre Ltd, to secretariat, declining invitation to make a submission to the inquiry and to appear as a witness on the 7 November 2018
- 7 November 2018 – Email from the Hon Natasha Maclaren-Jones MLC, to secretariat, advising that the Hon Scott Farlow MLC will be substituting for the Hon Trevor Khan MLC for the purposes of the meeting.

6. Adjournment

The committee adjourned at 4:10 pm until Monday 12 November 2018.

Madeleine Foley

Clerk to the Committee