

Exposure draft of the Bill
Office of Access Card,
Department of Human Services
PO Box 3959
MANUKA ACT 2603

Dear Sir/Madam,

Re: Exposure Draft of the 'Human Services (Enhanced Service Delivery) Bill 2007'

Introduction

Thank you for the opportunity to comment on this legislation.

The Monash University, Castan Centre for Human Rights Law is concerned about aspects of the proposed access card that may result in an erosion of personal privacy and other human rights. It is our view that, despite some important changes to the Human Services (Enhanced Service Delivery) Bill, the Exposure Draft fails to address most of the significant privacy and civil liberty issues that were raised in relation to the previous Bill. It is also our view that the process for consultation is substantially flawed both in terms of the inadequate period of time available for consultation and the lack of transparency concerning many aspects of this new initiative. We refer, in particular to the fact that many aspects of the new initiative lie outside the ambit of this Bill and that all details of the proposal, including the full KPMG *Access Card Business Case*, have not yet been released. In the case of the Business Case it is a matter of concern that the government has sought to impose

substantial charges for its release under the *Freedom of Legislation Act* 1982.¹

The Exposure Draft and the overall access card proposal of which it forms a part raise two specific categories of issues which are of concern to the Centre: privacy issues and issues relating to the protection of the ability of individuals to access government benefits.

Privacy is an important human right that underpins human dignity and other key values such as freedom of association and freedom of speech. Privacy impacts on the dignity and autonomy of the individual. It is a right that protects personal relationships as well as the individual's relationship with the government. Privacy protects against the abuse of power not only by the state but also by the business sector. The right to privacy was enshrined in Article 12 of the 1948 Universal Declaration of Human Rights, which states:

No-one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to protection of the law against such interferences or attacks.

Article 17 of the International Covenant on Civil and Political Rights mirrors Article 12.

The key privacy issues raised by the legislation are threefold:

1. it is designed as a centralised store of highly sensitive identifiable personal information including a biometric facial scan which is insufficiently protected against inappropriate

¹ See: Australian Democrats, 'Freedom of Information Request' (2007), http://www.democrats.org.au/campaigns/id_card/#foi, accessed on 10 August 2007.

- police checks or attacks by criminals and others who might wish to misuse its contents;
2. it is contained within a legislative structure which is highly vulnerable to function creep; and
 3. there is a substantial risk that it will morph into a de facto National ID card given the lack of appropriate measures to prevent its use for purposes other than those set out in its objectives.

The objects of the legislation

Clause 7(1) sets out the objectives for the introduction of the new access card. However, there is arguably a lack of clear nexus between the stated objectives and the introduction of a new access card. As has been pointed out by others,² there is a lack of evidence as to how precisely the new card will operate to reduce fraud given the scope for data matching which already exists via the tax file number. We would also query the assumption that the requirement to obtain and produce such a card will prove more convenient and user friendly for all users. The statement by the Australian Government that the Access Card is not compulsory is disingenuous. Every Australian, at some stage in their life will need to use their Medicare Card. This raises issues of practicality. Will it be possible for every individual residing in Australia to obtain and present the requisite documents for registration? The Access Card may be difficult to obtain for certain groups in society, such as those living in remote areas, the homeless, the mentally ill and

² See: Stott-Despoja, Natasha, Senator (South Australia, Australian Democrats), *Appropriation Bill Second Reading Speech*, 29 March 2007, http://www.democrats.org.au/speeches/index.htm?speech_id=2143&display=1, accessed on 10 August 2007; Australian Privacy Foundation, *Access Card Briefing Paper*, August 2007, <http://www.privacy.org.au/Papers/Briefing-APF-PIAC-0708.pdf>, at 10 August 2007; Electronic Frontiers Australia, *Submission to the DHS Access Card Consumer and Privacy Taskforce in response to Discussion Paper No. 3*, <http://www.efa.org.au/Publish/efasubm-dhstf-regist-200704.html>, accessed on 10 August 2007.

other disadvantaged groups. These people are usually the most reliant on government support services.³

Any failure to provide health care and social security to certain individuals in society, due to their lack of an access card could potentially result in breaches of the International Covenant on Economic, Social and Cultural Rights, Articles 9 and 12. The Exposure Draft 2007 includes cls 15 and 16 which allow the Minister, at his or her discretion, to exempt a class of persons or the Secretary to exempt an individual from the requirement of registration and the possession of an access card, for a limited amount of time. Whilst this is an improvement to the previous draft, it is unclear that this will provide sufficient protective measure for those disadvantaged in Australian society, especially given the lack of appropriate remedies outlined below. An approach which mandates exception on the grounds of specified criteria would be substantially preferable.

The Centre is supportive of the negative object in cl 7(2) that the card is not to be used or become a national ID card. However, we would point out that this is undermined by the fact that the Bill mandates a photograph on the surface of the card and specifically allows for the voluntary use of the card for self-identification. The Federal Privacy Commissioner has commented in relation to the inclusion of photograph that: "A card with near universal adult population coverage and having a printed photograph on its face would be close in appearance to a national identity card. With a photograph on the face of the card, the access card's uses would be

³ Crean, Simon, MP (Hotham, ALP, Opposition), Second Reading Speech, 07/02/07 accessed at http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2679321&TABLE=HANSARDR.

dissociated from the need for the access card to interact with an electronic reader for the person's identity to be established; the identity of the cardholder could be established immediately upon presentation of the card."⁴ Unless such uses are positively discouraged, there is a danger that the card will come to be used as de facto national identity card.

The Centre also has concerns about the wording of cl 7(3) which states that:

It is the intention of the Parliament that this Act should be construed, to the greatest extent consistent with the attainment of its objects, so as to limit interferences with the privacy of individuals.

We would argue that it is unsatisfactory for privacy to be made subservient to the objectives in cl 7(1). Instead that clause should be amended so as to require a construction which involves an appropriate balance between the achievement of the objectives set out in cl 7(1) and the protection of individual privacy.

Administration Policy

The Centre also has concerns about cl 8 of the Exposure Draft. Policy statements issued by the Minister are not legislative instruments and are not subject to Parliamentary approval (although they do need to be tabled). That is a matter of concern given the nature and extent of the of discretion to be given to the Secretary and his or her delegates, including the discretion to determine the manner and form of applying for registration and the information required establish a person's identity when applying for

4 OFPC, *Submission to the Department of Human Services: Access Card Consumer and Privacy Taskforce*, August 2006, [118] accessed at http://www.privacy.gov.au/publications/accesscard_sub_082006.html#mozTocId574810.

registration. The Centre submits that the Bill should set out the government's policy in relation to its administration and so that any changes would require Parliamentary debate and approval.

The Card

A Surface Information

According to cl 71 the surface information on the card will comprise an individual's name, card number, card expiry date, photograph, signature, date of birth and any applicable information concerning veterans' entitlements and blind disability support pensions.

The Centre agrees with the view expressed in the report of the Senate Finance and Public Administration Committee Inquiry into the Human Services (Enhanced Service Delivery) Bill 2007 Senate Committee's report⁵ that the only mandatory information to be displayed on the surface of the card should be the cardholder's name. Inclusion of a photograph, signature and card number is not necessary to achieve the objects of the legislation and significantly increases the potential for function creep as well as undermining the secure chip.⁶ As pointed out by the Australian Privacy Foundation, the existence of the photograph on the surface only serves to lend the card more weight as an all purpose ID card, with the potential for banks and businesses to use the access card as identification.⁷

There is no comparable document issued on a national scale in Australia that contains a photo of biometric quality. Alternative forms of identity, like the state issued driver's licence, are unlikely to be considered as being as authoritative as the Commonwealth access card. Passports, while highly authoritative, are not

5 Human Services (Enhanced Service Delivery) Bill 2007 [Provisions], Senate Committee on Finance and Public Administration, March 2007, p 24, [3.72].

6 New South Wales Council for Civil Liberties Inc (NSWCCL), *Submission 29*, February 28 2007, p 3.

7 Ms Johnston, *Committee Hansard*, 2 March 2007, p 21.

universally issued and are too bulky to be routinely carried by most citizens.⁸

Photograph

It has been argued by the government that the inclusion of a photograph on the surface of the card is important in reducing fraud. However, there is evidence to suggest that photographs are not necessarily an effective deterrent to fraud due to people's inability to correctly identify unfamiliar faces from photographs.⁹ Moreover, it is possible to address this issue without having a photograph on the surface of the card.

What it comes down to in reality is issues of convenience and cost. Insofar as the former is concerned it is arguably for the individual to decide the extent to which they wish to trade off privacy for convenience. The issue of cost arises in terms of the potential need to equip medical providers and others with appropriate card readers to access an individual's photograph on the chip. However, it would be possible instead to require individuals to provide some additional proof of identity in the absence of a card reader. Moreover, it is unsatisfactory that matters of cost should trump the protection of privacy and other civil liberties.¹⁰

8 Human Services (Enhanced Service Delivery) Bill 2007 [Provisions], Senate Committee on Finance and Public Administration, March 2007, p 17, [3.34]-[3.35].

9 Kemp, Nicola Towell and Graham Pike, 'When Seeing should not be Believing: Photographs, Credit Cards and Fraud' *Applied Cognitive Psychology*, Vol. 11, 211-222 (1997) cited in the submission by Electronic Frontiers Australia, to the DHS Access Card Consumer and Privacy Taskforce in response to Discussion Paper No. 3: Registration accessed at <http://www.efa.org.au/Publish/efasubm-dhstf-regist-200704.html>.

10 Senate Committee on Finance and Public Administration, March 2007, p20, [3.52].

Signature and card number

The inclusion of a signature and card number is arguably problematic to the extent that it further adds to the risk of identity theft (where the card is stolen and copied).

The Explanatory Memorandum for the Exposure Draft states in respect of the number that: 'An easily quoted number is required for on-line and call centre operations. If the number were to be eliminated from the card it would have several disadvantages. First, clients who call agencies by telephone would be required to identify themselves by other means using multiple references.' That statement is of concern to the extent that it suggests an intention to allow individuals to self identify simply via use of the card number, thereby posing a threat to individual's privacy from persons who are able to obtain access to that number.

The inclusion of information other than name should be at the discretion of the card holder. In addition, individuals should be provided with sufficient information (eg, by way of an information brochure) to make a fully informed decision of whether or not they wish to display their signature or card number on the surface of the card. The legislation should also contain provision for individuals to change their mind and request the removal or display of information on the surface of their card.

Use of access card number for linking data

The Privacy Commissioner and the Senate Committee have both recommended¹¹ that agencies only be able to access their information on the chip, using existing agency identifiers. Agency identifiers should be used when linking a card to a participating

11 Senate Committee on Finance and Public Administration, March 2007, p26, [3.82].

agency database rather than the access card number itself.¹² In the Centre's view this limitation should be expressly set out in the Bill.

Requested Production of the Access Card

It is an offence to request the production of an access card.

However, the access card can be used as proof of ID, if a person so chooses.¹³ This seems counterintuitive. If it is really the intention that the access card is not to be used as a national identity card, what is the purpose of specifically legitimating its use by individuals to identify themselves to bodies not involved in the service delivery for which it is prescribed?

The Register

A Information in the Register

Under cl 35, the register will contain cardholders' names, dates of birth, citizenship or residency status, indigenous status, sex, contact detail, details of benefit cards, registration status, proof of identity status, access card numbers, photograph, signature and veterans' entitlement information. It will also contain additional information required by law or by administrative rules to be in the register, flags identifying an individual's relationship with any participating agency, any emergency payment number and, where a cardholder is dead, relevant details about his or her death.

The Register will contain a national mega database of information which will pose a possible risk to the personal privacy of most Australians. As pointed out the Federal Privacy Commissioner, 'such a rich central repository of personal information may prove particularly tempting to hackers and organised crime, as breaching

12 Senate Committee on Finance and Public Administration, March 2007, p26, [3.83].

13 AFP criticisms of new Bill (Anna Johnston), Privacy Foundation http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html.

the system will provide them with access to details on almost all adult Australians'.¹⁴ Moreover, it is also of concern that the already vast list of information to be stored within it can be added to by administrative rules as well as by other laws.

B Registration requirements

The requirements for registration are left to the Minister under cl 9. Arguably the requirement to consult with the Privacy Commissioner is insufficient – there should also be a requirement to table the recommendations of the Privacy Commissioner in Parliament.

C Security Concerns

The register poses serious risks in terms of identity theft. As pointed out by the Victorian Privacy Commissioner, Ms Versey, it places a person's whole identity in the one place.¹⁵ It is therefore important to minimise as far as possible the information which is stored and to ensure that it is secured to the highest standard. Unless information is effectively secured there will be a lack of public confidence and trust in the access card system.¹⁶

The Exposure Draft contains little detail concerning the maintenance of the Register other than that it will be kept in electronic form. Apart from the requirements in cl 93 for information in the register to remain in Australia and not be combined with other specified information, the Exposure Draft provides only that the Register must be established and maintained in accordance with any directions given by the Minister (cl 33(2)). Furthermore, cl 33(4) provides that such a direction is a legislative instrument, but that

14 OFPC, *Submission to the Department of Human Services: Access Card Consumer and Privacy Taskforce*, August 2006, [59] accessed at http://www.privacy.gov.au/publications/accesscard_sub_082006.html#mozTocId574810.

15 Ms Versey, *Committee Hansard* 5 March 2007, Melbourne p 4.

16 *Access Card Consumer and Privacy Taskforce, Report Number One*, September 2006, p 34.

neither s 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies it.

As Professor Fels has previously commented, parliamentary oversight has the potential to strengthen the security and governance of the register.¹⁷ It is important that there should be clear legislative guidance concerning the manner and form in which the Register is kept and effective Parliamentary oversight over any changes to the relevant procedures. Both of these are currently lacking in the Exposure Draft.

A further concern is that details concerning retention and disposal of information contained in the Register are left to be determined by Administration Rules (cl 186) rather than set out in the Bill itself.

Finally the Exposure Draft lacks any requirement for breach notification. We are of the view that notification requirements can play a valuable role both in terms of enhancing public confidence and in providing an incentive to maintain security to the highest standard.

E Access by Police and others

The Centre is also concerned about provision in cl 109 for disclosure to a senior officer of a police force if the senior officer has certified in writing that the disclosure of information relating to the individual is reasonably necessary for the prevention, investigation or prosecution of a serious offence. A serious offence is broadly defined as any offence which is punishable by imprisonment for 2 years or more. In this circumstance the senior officer would not need to obtain a warrant.

¹⁷ Senate Committee on Finance and Public Administration, March 2007, p31, [3.105].

There are also similar concerns with cl 110 which permits disclosure to a senior officer of the Australian Crime Commission if the senior officer has certified in writing that the disclosure of information relating to the individual would be connected with the performance by the Commission of its functions. Likewise, cl 111 permits disclosure to a senior officer of an intelligence agency if the senior officer has certified in writing that the disclosure of information relating to the individual would be connected with the performance by the intelligence agency of its functions.

Warrants play an important role in ensuring that police and security agencies require access to information for a legitimate purpose and have established to an independent third party that there is a reasonable basis for concluding that access to the documents will assist in the pursuit of the legitimate purpose.

F. Function Creep

As noted in the introduction, one of the major concerns arising from the access card proposal relates to the potential for function creep.

The Exposure Bill seeks to limit this by confining access (apart from specific exceptions to deal with police access and other special circumstances) to participating agencies which are defined as meaning the Department of Human Services (DHS), the Department of Veterans Affairs (DVA), the Chief Executive of Medicare Australia and the Chief Executive of Centrelink and by limiting access and use to Commonwealth officers in those agencies in respect of the performance of functions or duties connected with the provision of Commonwealth benefits. The expression Commonwealth benefit is broadly defined in cl3 as meaning:

- (a) a benefit or service that:

- (i) is provided to an individual under a law of the Commonwealth or under the executive power of the Commonwealth; and
 - (ii) is administered or delivered, wholly or partly, by a participating agency; or
- (b) any other benefit or service:
 - (i) that is provided to an individual under a law of the Commonwealth; and
 - (ii) in relation to which a law of the Commonwealth provides that (or to the effect that) the benefit is not to be provided unless the individual, or another individual, is access card compliant at a particular time.

It is therefore open to the government to expand uses of the card simply by defining some other aspect of its activities as a 'benefit or service' and either transferring it to one of the participating agencies or declaring that it is unavailable to persons who are not access card compliant. The Centre would point out that that approach has already been used to expand the range of activities for which tax file numbers may be collected and used.

G Destruction of copies of POI documents

In the Centre's view it is important that the legislation should specifically require the destruction of any copies of POI documents once the card holder's identity has been established. Their retention would pose an unacceptable privacy risk and no obvious benefit.

Crown Immunity

In the light of the decision by Marshall J in *Laing v Carroll* [2004] FCA 1509, the Centre is concerned that the provision for Crown immunity in cl 9(2) may undercut the protection provided by the offence provisions in the Exposure Draft. Although such clauses are

not uncommon, it is arguable that this particular one is inappropriate given the potential dangers posed by the card and the importance of deterring wrongful access to, and disclosure of, information relating to it. The government has argued that 'in the circumstances of a breach of the proposed legislation it could not be said that the public servant was acting on behalf of the Crown'.¹⁸ However, it is unclear why this would necessarily be the case.

18 See Senate Inquiry – Health and Social Services Access Card Questions on Notice at http://www.aph.gov.au/SEnate/committee/fapa_ctte/access_card/answers/dhs_second.pdf.