

Health and Social Services Access Card:

Comment on exposure draft of Human Services (Enhanced Service Delivery) Bill 2007

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 Consultation period and opportunity for public comment

PIAC is concerned by the period of time set aside for public consultation and comment on the Human Services (Enhanced Service Delivery) Bill 2007 (**the Bill**), especially given that the one-month consultation period extended over the Christmas/New Year period – from 13 December 2006-12 January 2007.

It is PIAC's view that only a genuine commitment to consultation and public comment will result in positive outcomes, both in terms of the Bill and the access card proposal more generally.

2. The exposure draft - general observations

PIAC's position on the Federal Government's access card proposal has always been that we are not convinced that the introduction of the card is in the public interest. We are concerned by, amongst other things, the lack of detail that has been released publicly about the card, the lack of public debate around the introduction of the card, the possibility of cost blow-outs, and the lack of a publicly released Privacy Impact Assessment about the proposal. In this submission PIAC focuses on improving the Bill should the access card proposal be implemented.

2.1 Public debate

An information technology project of this size should not be commenced without full public debate about the implications for privacy and data protection. Australians have never had a national identity database of this size or kind before, and it is important that the public be informed about the protections that the Government plans to implement to ensure people's personal information is not misused or disclosed inappropriately.

At this stage, the Privacy Impact Assessment produced for the Government has not been released to the public because it was based on a 'previous model' for a national identity card. In PIAC's view, there are very minor differences between a national identity card and what is being proposed. PIAC believes that even if there are significant differences between the card considered by the Privacy Impact Assessment and the current model, the Government can and should release the Assessment, articulate these differences and then allow the public to decide. Alternatively, a Privacy Impact Assessment should be developed and released to the public in relation to the current access card proposal. The current approach requires the public to simply take the Government on trust. PIAC does not believe this is an adequate measure to ensure accountability.

2.2 Protection of personal information

PIAC's major concerns about the card centre on the protection of personal information through the national identity database that will be encompassed in the Secure Customer Registration Service (SCRS) and the document verification system (DVS). There is very little publicly available information about the DVS and PIAC only became aware of this element of the proposal through the face-to-face consultation with the Taskforce. The establishment of the national identity database and the DVS represent significant changes in the way the Government currently manages the personal information it collects.

The most important issue not addressed by the Bill, is transparency in relation to how the information collected will be used. It is unclear what individuals and bodies will have access to the database that is being created as a core part of the scheme. There is no detail provided on who will have access to the database, nor are there specific penalties for inappropriate access.

2.3 National identity card?

The Federal Government asserts that the Bill will ensure that the proposed access card is:

- Not a national identity card;
- Not required to be carried at all times; and
- Not able to be required outside health and social services.

PIAC is not convinced that the card will not become a national identity card.

The Government has stated that the card will become a more reliable way of proving people's identity and will be linked to a national identity database. Every Australian who wishes to access Government benefits will need an identity card. The card is intended to become the most reliable way of proving your identity, and will be used widely for this purpose.

Whilst it is positive that the card will not have to be carried at all times, it is worth emphasizing that in the UK where they are introducing what is openly acknowledged by Government as an identity card, their relevant legislation also contains a clause which stipulates that citizens do not need to carry the card at all times (Clause 15 (3) of the UK Identity Cards Bill).

Whilst there may not be a formal obligation to use an access card, the extensive reliance on the card by Government services and agencies will mean that the card will become the preferred means of providing a person's identification and a *de facto* national identity card.

3. Detailed comment on the Bill

3.1 Part 1 - Introduction

Authorised person

'Authorised persons' are delegated significant powers of access under the terms of the Bill. PIAC has concerns about the lack of specification around who may be deemed to be an 'authorised person'.

Under the definitions section of the Bill, an '*authorised person*' means '*an individual appointed to be an authorized person under section 340.*' Under clause 340, the following is stated:

340 Authorisations by the Secretary

(1) The Secretary may, in writing, appoint:

(a) a Commonwealth officer; or

(b) an individual prescribed by the regulations:

to be an authorized person for the purposes of a specified provision of the Act in which the expression "authorized person" occurs.

In PIAC's view, this clause is too broad and should be amended to differentiate categories of access to information and categories of authorised persons as part of the access card scheme and its associated register. Given that authorised persons will have access to potentially all of the information contained in the Register, broad-based powers of access are inappropriate and unnecessary. This important issue of access should be addressed in the principal legislation creating and regulating the access card and not by subordinate regulations.

Policy Statements

Clause 30 of the proposed Bill outlines the concept of the 'policy statement'. PIAC is concerned that wide powers are granted under this part of the Bill. Such policy statements would affect the interpretation of the legislation without passage through Parliament, effectively making these interpretations beyond review. PIAC is of the opinion that this clause should be removed.

3.2 Part 2 - Registration

How the Register will be kept

Under clause 70(2) the proposed legislation outlines that the '*Register may be kept in any form or manner that the Secretary considers appropriate.*' PIAC is concerned that there is not any further specification in this section, given the nature and importance of the security of the Register.

Copies of identity documents may be kept on the Register

The Bill specifies under clause 75 item 11 that copies of documents used to prove identity may also be kept in the Register. PIAC is concerned by the lack of justification for the need to keep copies of documents, and under what circumstances this may occur.

Item 11 of the 'Information on the Register' states that if the Secretary determines that a copy of a document produced in relation to proving a person's identity should be kept on the Register, it will be kept on the Register. There is no explanation of what factors the Secretary must take into account in making such a determination. The Explanatory Memorandum accompanying the Bill states that copies of identity documents will be kept *'for the purpose of establishing who you are.'* In PIAC's view, copies of proof of identity documents should not be kept along side personal information in the Register, for privacy and security reasons. If they are to be kept, copies of proof of identity documents should only be kept under limited circumstances, and, at the very least, those limited circumstances should be outlined in the legislation.

There are already considerable concerns among consumers about ensuring that the information contained in the Register is secure. The more information that is contained within the Register, the greater the risk to individuals if that information is inappropriately accessed.

3.3 Part 3 - The access card

Details of dependants

Pursuant to clause 100 (b), a person must be at least 18 years of age in order to obtain an access card. The clause which outlines what information will be contained on the Register does not indicate that the names and details of dependants will be included with their parents' details. PIAC is concerned that this is an oversight that needs to be addressed.

Owning your access card

Clause 175 of the Bill states that 'You own your access card.' PIAC is concerned that, once all factors are considered, this concept has limited meaning.

In relation to clause 175 of the Bill, much has been made publicly about the concept of owning your access card, and how this is a defining feature of the proposal. PIAC is unconvinced that this is a particularly meaningful initiative. Under point 5.87 of the Explanatory Memorandum, the following point is made:

5.87 In relation to the access card, the Australian Government believes that legal ownership of the card should vest in the individual so that the access card will truly be YOUR CARD and you control the extent to which it is used.

Obviously a person will not control the extent to which their card is used, as they will need to produce it every time they engage in a transaction with Government. This is something over which the majority of us have no control.

The Bill goes on to outline that ownership of the card does not imply ownership of the information contained within the chip. However, effort is made to emphasise that ownership of the card means more than owning the piece of plastic. As part 5.89 of the Explanatory Memorandum outlines:

5.89 The card consists of more than just the physical card. It also includes information that is stored in the chip of the card. It is not intended that ownership of the physical card also vests ownership rights in the information on the chip of the card. For this reason subclause 175(3) clarifies that ownership of the physical card itself does not give the holder ownership of the information in the Commonwealth's area in the chip in their access card that they do not otherwise have.

So, effectively, ‘ownership’ means that people will own the plastic, the chip, and their name and address details, as well as information that they already previously ‘owned.’ As stated above, ‘ownership’ of the card appears to be a relatively meaningless concept.

3.4 Part 4 - Offences

At the moment, an offence exists under clause 255, ‘Changing information in the Commonwealth’s area of the chip in someone else’s card’ which carries a 5 year imprisonment or 500 penalty point (or both) penalty. In PIAC’s view, it ought also be an offence to inappropriately access information on the card. An example of such an offence could read as follows:

226 Accessing information in the Commonwealth’s area of the chip in someone else’s card

A person commits an offence if:

- a) the person intentionally accesses any information in the Commonwealth’s area of the chip in an access card; and*
- b) the person is not the holder of the access card; and*
- c) the person does not do so for the purposes of this Act.*

Penalty: Imprisonment for 5 years or 500 penalty units, or both.

It is our understanding that in the relevant UK legislation, there is an offence of interfering with the central database, which carries a 10 year prison penalty. We should implement a similar offence in relation to the access card in Australia.

4. Key areas in which the Bill should be developed further

The Access Card Consumer and Privacy Taskforce recommended in its first report that a comprehensive legislative framework be developed to accompany the access card scheme (Recommendation 6). Whilst the Government has conceded that further legislation is in the pipeline, this is insufficient given the implications of what is missing from this first, and ultimately very important piece of proposed legislation. The only detail which has been provided about what will be contained in the second piece of legislation is that it *‘is intended that the second bill will detail registration, concessions, cancellations, and replacements, as well as dependants and persons who are linked to other people (such as carers, partners etc).’*¹ This is an inadequate amount of detail giving that the first piece of legislation is lacking in key areas.

PIAC calls for the most stringent legislative protections in relation to all aspects of the card. It is our view that additional legislation will be required to provide an appropriate framework for the access card proposal. Additional legislation should be drafted to establish the following:

- the biometric photographic database, if this database is to be established separately;
- the document verification scheme;
- a framework for how the access card and register interact with the document verification scheme;
- who has access to the document verification scheme;
- who has access to SCRS;
- penalties for unauthorised access of the SCRS, as suggested above;
- protection against the retention of incorrect information;

¹ Department of Human Services, ‘Overview of proposed legislative package’ 13.12.06, p 6

- limits on what agencies can access information and the extent of that information;
- limits on data matching.

4. Case Study Example: United Kingdom

In 2005, The London School of Economics and Political Science (LSE) produced an analysis of the UK Identity Card proposal being currently considered and introduced in the United Kingdom, *The Identity Project: An assessment of the UK Identity Cards Bill & its implications (the Report)*.²

The LSE, in its report, examines some of the key features of the proposals, including that the technology proposed for the introduction of the card and the storage of information are largely untested and unreliable, and that the use of biometrics gives rise to concern because the technology has never been used on such a scale. One of the key concerns is that the scheme introduces a new technological infrastructure that will carry high risks if it fails. For example, the Report expresses concern that a centralised database, similar to that being introduced in Australia, could itself become the subject of terrorist attacks and/or hacking. No system is absolutely safe against possible incursions. One of the key concerns expressed was that the ‘National Identity Register’ to be created in the UK may in fact pose a greater risk to the security of UK citizens than the system it purports to replace.

The Report states that because of its size and complexity, the system will require enhanced security features, and that this will take the costs higher than initially expected.

The Report notes that the British Government has significantly underestimated the cost of gathering biometric data, and that special equipment will need to be used for people with disabilities who may have particular (additional) reasons for being sensitive about giving their biometric data.

The Report also concludes that the British Government has underestimated the cost of registration, as well as noting that costs will increase as 17% of the population (aged, disabled, young) will need to have their biometric information updated every five years; responding to this situation may require multiple biometrics to be gathered, in turn adding to the cost of the scheme.

The Report outlines some key issues in regard to the legislative proposals put forward by the UK Government. Some conclusions can be drawn which are relevant to the Australian experience.

*The Identity Cards Bill is something of a misnomer in that the card element is only one part of a much larger integrated scheme. The proposal is multi-faceted and far-reaching, and in its current form will involve substantial use of personal information within a complex legal and technological environment.*³

According to the LSE report, the UK legislation permits the disclosure of information from the register without the individual’s consent to (among other agencies) police organisations, the security services, HM Revenue & Customs and the Department for Work & Pensions.

Under clause 19 (3) of the Bill information from the register can be handed to or accessed by police for the purposes of the prevention or detection of crime. This provides substantial scope to use the

² London School of Economics and Political Science, *The Identity Project: An assessment of the UK Identity Cards Bill & its implications (2005)*
<<http://www.lse.ac.uk/collections/pressAndInformationOffice/newsAndEvents/archives/2005/IDReport.htm>> at 3 January 2007.

³ Ibid p 38

information. Police may, for example, apply to link fingerprint information on the register to “crime scene” evidence.

The proposed Australian legislation at no place provides this level of detail, ie. as to what agencies, and for what purpose, other agencies can access information contained within the national register. In PIAC’s view, this is inappropriate. Australians have the right to know who will access their information on the register, and for what purpose.

As the LSE Report observes about the UK ID Card scheme:

The risk of failure in the current proposals is therefore magnified to the point where the scheme should be regarded as a potential danger to the public interest and to the legal rights of individuals.⁴

5. Conclusion

The Access Card Bill, whilst including some protections, is lacking fundamental detail in order to ensure the privacy and identity security of all Australians who are issued with an access card.

Given the significance of the access card proposal, the Bill as proposed offers inadequate protections to ensure that card holders will have their identity, and their privacy protected.

An information technology scheme of this size entails inherent risks, and the accompanying legislative framework ought to demonstrate that the Federal Government takes the protection of personal information very seriously. This Bill does not reflect the level of commitment which the Government claims to hold about ensuring the protection of personal information, and to guard Australians against unwanted and unnecessary incursions on their privacy by Government employees, Government agencies, or interested others.

⁴ Ibid p 9