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Second Exposure Draft 'Access Card' Legislation, 2007

Submission to
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Office of the Access Card

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The Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

For further information about the organisation, see www.privacy.org.au

Our extensive criticisms of the 'Access Card' initiative since its inception in 2005 are documented on our website at http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html

Introduction

The Department has invited submissions on the Exposure drafts of the Human Services (Enhanced Service Delivery) Bill 2007 ('the draft Bill') and the Human Services (Enhanced Service Delivery) (Consequential) Bill 2007 ('the draft consequential Bill').

The Australian Privacy Foundation would normally welcome the opportunity to comment on draft legislation, in the hope and expectation that the Government will be willing to consider improvements.

In this instance, regrettably, we have no confidence that the Government is seriously interested in considering the major deficiencies in the draft legislation. Little notice has been taken of the widespread criticism of the first 2007 Exposure Draft Bill and the 2007 Bill as introduced, including the cross-party report on the latter Bill by the Senate Finance and Public Administration Committee in March 2007, the recommendations of the Government's own Consumer and Privacy Task Force, and the continuing reservations of the Australian Privacy Commissioner.

The Government persists in the pretence that this is not a National Identity Card scheme. The earlier assertions to this effect could be discounted as 'spin', but the express denial in the current draft Bill (cl.7(2)) amounts to serious misleading of the Australian population – this would be dishonest legislation making claims which in the private sector would clearly fall foul of the Trade Practices Act prohibition on 'misleading and deceptive conduct'.

We note that the Government is no longer attempting to promote the scheme as a 'voluntary' scheme. Up until the introduction of this Bill, the Government was trying to pretend that the scheme would be 'voluntary' and rely on informed consent. The Government appears to have taken on board comments from organisations, including APF, that selling the scheme as voluntary was not credible to Australians all of whom receive some entitlement or payment or service from the Government. The Government no longer appears to be hiding the 'compulsory' nature of the scheme – that is compulsory for every Australian who accesses Medicare benefits, and the millions of Australians who access some other form of Centrelink benefit (family payments, pensions, student payments, childcare and veterans entitlements to name a few). The concession that there will be some circumstances where benefits or services can be provided without production of the card itself (although the details are sketchy) does not make the scheme voluntary as registration will be mandatory. The bottom line is clearly 'No registration, No entitlement.'

While we welcome the greater honesty at least in that respect, it simply shows the scheme even more clearly for what it is – a compulsory National ID scheme. Had the Government responded to the criticism in a different way – by making the Access Card a genuinely 'voluntary' scheme (where individuals would not miss out on vital government services and benefits if they chose not to register) would be one way of assuring the Australian public that the Government is not embarking on a national identity project.

In this submission, we do not propose improvements to what is deeply flawed legislation - it is so unacceptable that in our view it must not be introduced in anything like its current form.

Instead, we take the opportunity to point out how the provisions of the draft legislation confirm our fears about the true nature of the 'Access Card' initiative and the devastating and irreversible effect it would have on the privacy, human rights and civil liberties of all Australians.

We have no objection to sensible and balanced improvements in the administration of particular government programs such as Medicare and Centrelink and Veterans benefits, including the appropriate use of new technologies such as smartcards. But this can all be done without a single

multi-purpose identifier and a central population register.

This legislation is without doubt one of the most significant assaults on privacy in the last twenty years – in fact since the last attempt to introduce a national identity card in the form of ‘The Australia Card’ in the late nineteen-eighties.

No government can be trusted with the power that this scheme would give it to monitor individuals and, wholly at its discretion, to use the Card and Register to intrude into and micro-manage individuals’ personal affairs.

Overall lack of protection for privacy

The draft legislation includes a raft of superficial controls and safeguards, including limits on the information to be held and on access to that information; an ombudsman and review rights, and the Government has promised additional accountability measures such as a consumer charter.

However, on closer examination, almost all of these are either undermined by exemptions and other provisions in the draft Bills, or can readily be circumvented if a future government decides it wishes to expand the functions of the scheme. Most of the safeguards and accountability measures amount to little more than marginal improvements in the existing ability of the Privacy Commissioner to address complaints about breaches of the controls in individual cases.

The excessive level of intrusion inherent in the design of the scheme, with its universal national population register and *de facto* mandatory identity card, is not addressed, and no effective controls are placed on the future extension of the scheme.

Some of the supposed safeguards are so ineffectual as to be insulting – for example the purported ‘ownership’ of the card by the cardholder (cl.78) is meaningless, as the parameters of card use are set by other provisions, and by ‘administration rules’ to be made under the Act.

Also, the superficial limits on ability to demand production of the card and on access to information held in the Scheme appear to be negated by the immunity of the Crown from prosecution provided by cl.9(2). What value do the limits and controls have if the very agencies which are most likely to want to breach them are immune from prosecution? We are not assured by the Explanatory Memorandum (EM)’s statement that crown immunity does not extend to crown servants – it is doubtful if a public servant acting within authority would commit an offence, leaving agencies free to contravene the limits without risk of significant sanctions. We refer you to the submission from the Cyberspace Law & Policy Centre at UNSW¹ for a more detailed explanation of this concern.

Dangers in every aspect of the national ID card scheme

Details on the card face

The details to appear on the face of the card remain unchanged, despite the strong recommendations of the Task Force and of the Privacy Commissioner to limit the details on the face, since some of them do not appear to be necessary for the declared objects, and yet they increase the risk of identity crime, and of the card becoming widely used as *s de facto* national identity card.

The form of the card is still determined by the Minister, and such a determination is not a legislative instrument (cl.67(6)), putting both the content and which items on face of card are machine-readable beyond Parliamentary scrutiny.

¹ See http://www.cyberlawcentre.org/privacy/id_card/index.htm

Access to information on the chip

PIN protection of chip content is only required for name, DOB and POI status (full/interim) (cl.77). The card and the chip are not 'protected records' (cl.89), so many of the confidentiality provisions do not apply. Prohibitions on unauthorised access to/ modification/impairment of chip content (cl.97-98) only apply to 'restricted information' (i.e. held in chip and where an 'access control system' applies) - nothing in draft Bill appears to require such protection (except PINs in cl.77). So photos, signatures etc on the chip are not required to be protected against anyone accessing/copying them from the chip, no matter what means they use – and there appears to be nothing to prevent chip content being read remotely. This slackness opens the door for expanded uses by the private sector.

Who can require the card to be produced?

The Government continues to maintain the fiction that production of the card will be voluntary. The legislation makes it clear that this is false on two counts. Firstly, key welfare and health agencies will be able to require production of the card in all but a very limited set of special circumstances. Secondly, anyone can request production of a Card. As everyone knows, it is easy to pretend to 'request' while in effect 'requiring', by limiting the acceptable ID that can be proffered. There appears to be nothing to stop either government agencies or private sector organisations setting their 'proof of identity' criteria in such a way that the access card becomes the only practicable way of satisfying them. Even if the legislation prevents denial of service in theory, it can easily be made so inconvenient that not producing the card will cease to be a realistic, practical option.

The Access Card Register

While the Government is able to claim that carrying and production of the card will not be mandatory because of its recognition of 'special circumstances', it remains clear that registration will in effect be compulsory for all as it will be required to access Medicare benefits, to which every permanent resident is entitled.

Nothing in the draft Bills addresses the many concerns that have been expressed about how the registration process will work in practice without disadvantaging and discriminating against many thousands of individuals in a range of 'non-standard' circumstances. The draft Bill perpetuates the flawed assumptions about how easy it will be to 'prove' identity to the satisfaction level required – and completely ignores the very real issue of genuine 'multiple' identities. The scheme will force every individual into a tidy-minded bureaucratic model where individuals are assumed to have a single unambiguous official identity with all other 'persona' being secondary aliases. This flies in the face of reality – and of humanity, and is not only demeaning but also doomed to failure.

There has been little public discussion of the implications of the 'evidence of identity requirements' and the Bills do not shed much light on this important issue. In particular, there appears to have been little consultation with the States and Territories about the likely massively increased demand for documents such as birth and marriage certificates and drivers' licences, and the question of who will pay for servicing this demand. We note that the Victorian Privacy Commissioner has raised some significant concerns about this neglected aspect of the proposal.

While the Government seeks to make much of the design that leaves agency specific details in separate databases, the register itself will still contain an accumulation of personal information unprecedented in Australian history, and will of course provide an easy path by which the separate information can be linked, once that is authorised. The information already expressly specified to be included in the Register (cl.35) represent a 'honeypot' of personal information of great potential value to identity thieves or fraudsters. Given the impossibility of guaranteeing any large information system against unauthorised access, this is an unacceptable risk.

The draft Bills do not address the concern of the Task Force that there should be parliamentary scrutiny and control over the form and content of the Register. The Register itself is expressly not a legislative instrument (cl.33(6)). Clause 35 item 18 allow additions if the 'Administrative Rules' (ARs) require this, and cl.187 allows ARs to contain matters permitted by cl.34/35. This 'closed circle' would appear to allow unlimited expansion of Register content. Expansion of the Register would not require legislation – and the supposed safeguard that ARs would be disallowable is of limited value – subordinate legislation is rarely even noticed let alone disallowed.

We note in particular that an AR could still bring 'proof of identity' data into the Register – something that the Task Force expressly warned against. The Register also expressly includes the digital 'photos', again contrary to the recommendations of the Task Force.

Access to information in the Register

Access / disclosure / use is generally restricted to the purposes of the Act (Pt 5, Div 1 & 2), and disclosure of Register information is prohibited generally, despite contrary provisions in either existing or future laws (cl.116). This seems superficially to be a tightly controlled regime, and does at least prohibit fishing expeditions by most agencies (subject of course to easily achieved later amendments). However, the Division 4 exceptions give very broad access rights to any (senior) police, or intelligence agencies or Minister for Immigration (cl.109-112). The value of the Register as the 'honeypot' for investigators would clearly be enshrined in law.

Potential for 'Function Creep'

We have already alluded above to some of the many provisions in the Bill which facilitate future extensions in the scope and functionality of the 'Access Card' scheme – commonly known as 'function creep'. The provision in cl.7(1)(e) that the objects include permitting card holders to use the cards for 'such other lawful purposes as they choose' opens the door wide for both government and business to make wider uses of the card attractive. As many previous submissions have pointed out, the only way to stop the card becoming a *de facto* National Identity card is to expressly prohibit function creep – instead it is clearly envisaged and facilitated.

Emergency payments

Another major opportunity for function creep is created by the provisions for the card to be used for 'emergency payments' and the inclusion of an 'emergency payment number' (cl.74). This is a new function introduced since the earlier drafts. One of our main concerns is the uncertain meaning of 'emergency'. In the absence of any definition or criteria, these provisions potentially allow the Government to authorise almost any use of the card simply by linking it to some form of payment – existing or new, and on an ongoing basis. The intended links to the banking system confirm this potential.

Given that the Government has only recently introduced a mechanism into the Privacy Act for declaring an emergency², it is both surprising and suspicious that it has not linked the 'Access Card' legislative provisions to this mechanism, which would at least provide some re-assurance that it is only intended to operate in extraordinary and temporary circumstances.

New welfare arrangements

The 'function creep' potential for the Access Card is clearly evident in some recent Bills. The Northern Territory National Emergency Response Bill 2007 (and related Bills) provide for quarantining welfare payments, and would presumably make use of an 'Access Card'. The Social Security and other legislation Amendment (Welfare Payment Reform) Bill 2007 outlines the Government's proposal for a nationwide system to link welfare payments to school enrolment and

² Part VIA, introduced by the *Privacy Legislation Amendment (Disasters and Emergencies) Act 2006*

attendance. Presumably, to implement this latter scheme, State and Territory data on school attendance would be sought by Centrelink and used to determine how and when welfare payments are to be made. Again it is entirely predictable that the Access Card scheme would play a part in the administration of this proposal. The public deserve an up-front explanation of whether, and if so how the scheme would be used in relation to these and other initiatives.

Concessions

The Bills offer no re-assurance about the use of the 'Access Card' in relation to the wide range of concessions offered by State & Territory governments, and by the private sector, to individuals on various categories of benefit, who now typically produce a Commonwealth benefit card to establish entitlement. The Government has to date been unable, or unwilling, to provide any clarification of this 'obvious' category of use of the 'Access Card', and we understand that there has been inadequate consultation even with the States and Territories on this issue, and we note that the Victorian Privacy Commissioner has raised some significant concerns in this respect.

Private sector use in connection with statutory obligations

The Bills offer no re-assurance about the use of the 'Access Card' in relation to various statutory evidence of identity or 'know your customer' requirements, including the very wide-ranging obligations on reporting entities under the so-called Anti Money-Laundering and Counter-Terrorist Financing Act 2006 (AML-CTF) (another example of dishonesty in legislation as the AML-CTF scheme applies to a far wider range of offences and functions than the title suggests).

The Government also needs to explain how the 'Access Card' and Register would relate to the requirements on all employers to report new employees to the Australian Taxation Office, to the proposed Document Verification Service, and to the overall National Identity Security Strategy.

Biometrics

To date there has been wholly inadequate justification for the use of biometrics given the stated aims of the Access Card scheme. Biometric technology remains highly privacy invasive and still largely experimental – applications such as the use of face recognition software in the SmartGate border control initiative have yet to be proven and seem fraught with technical and operational problems³. Any use of biometrics needs to be tightly focussed, applied only to restricted populations for very specific purposes, and with tight privacy safeguards. The use of biometrics in health and welfare administration, particularly given the current immaturity of the technologies, is simply disproportionate. There are other less privacy invasive and more reliable tools to reduce fraud, and the compulsory inclusion of a biometric photograph would appear to be an indication that the Government has further (as yet unstated) purposes for the *de facto* ID card in mind.

Furthermore, there is little evidence that the Government has taken the privacy issues associated with biometric technology seriously. For example, it is significant that the Biometrics Institute – the peak industry body representing users and suppliers of biometrics – with more than fifteen Commonwealth agency member (including, ironically, the Office of the Access Card (OAC)!) – has made a submission on this legislation calling for significantly increased safeguards.⁴ We note that the OAC has not signed up to the Institute's Privacy Code, which was approved by the Privacy Commissioner in July 2006. While the Code only has a formal role under the Privacy Act for private sector, there is nothing to stop government agencies from voluntarily committing to the standards in the Code, and we find it disappointing that the OAC has not done so.

³ We refer to the detailed concerns about biometrics set out in the submission from Electronic Frontiers Australia

⁴ Media Release 15 August 2007 – see <http://www.biometricsinstitute.org/>

Governance and accountability

The provision in the draft legislation for merits review of some decisions and for an Ombudsman and for a Consumer Charter (not in the Bills) are all necessary for any scheme of this significance but are not in themselves adequate.

The Government has ignored calls, including from its expert advisers, for truly independent governance arrangements – including a separate agency, and a dedicated parliamentary committee. We note that the Privacy Commissioner is recommending a statutory review mechanism for the overall scheme.

We submit that if the Scheme goes ahead in anything like its current form the governance and accountability arrangements need to be significantly strengthened, at least in the ways suggested by the Task Force and Privacy Commissioner.

Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.