



CHIEF MINISTER'S DEPARTMENT

Committee Secretary
Senate Finance and Public Administration Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary

Attached please find the ACT Government's submission to the Senate Finance and Public Administration Committee's Inquiry into the Human Services (Enhanced Service Delivery) Bill 2007.

Should you have any questions related to the submission please free to contact me on (02) 6207 76136.

Yours sincerely

Philip Mitchell
A/g Deputy Chief Executive, Policy

27 February 2007

**ACT GOVERNMENT SUBMISSION
TO THE
SENATE FINANCE AND PUBLIC ADMINISTRATION
STANDING COMMITTEE INQUIRY
INTO THE
HUMAN SERVICES (ENHANCED SERVICE DELIVERY) BILL 2007**

INTRODUCTION

1. The ACT Government welcomes the opportunity to make a submission to the Standing Committee's Inquiry into the Human Services (Enhanced Service Delivery) Bill 2007.

2. The ACT Government has contributed its views on the development of the Access Card proposal and has been in officer-level dialogue with the Office of the Access Card (OCA) since August 2006, seeking advice and clarification on a range of issues. In addition, the Chief Minister met with the former Minister for Human Services, the Hon Joe Hockey, to receive an initial briefing on the Access Card.

EXPOSURE DRAFT CONSULTATIONS

3. The ACT Government made a formal submission to Minister Hockey and the OCA in January 2007 commenting on the exposure draft of the legislation.

4. The ACT Government notes that there were more than 120 submissions on the draft legislation raising a range of issues. This number of submissions, despite the conduct of the consultation process over the Christmas / New Year holiday period, indicates a very high level of interest in, and some degree of concern about, the proposal.

5. However, the amendments made to the Bill as introduced into the House of Representatives on 7 February 2007 generally fail to respond to the community's comments and there has been minimal change to the exposure draft.

6. It is noted that provision has now been made for the Privacy Commissioner to advise on the appropriateness of a form used to collect information as approved by the Secretary. However, it is apparent that the major focus of change has been on expanding the matters for inclusion on the on the Register and chip. Amongst other things additional information will now be collected on:

- Honorific titles
- Indigenous status
- Registration status (including if identity has been determined in "full" or "interim")
- Other information (for example, a password) for authenticating identity

7. In this respect, it is worth noting that the Australian Government's principal argument to date that the Register will not be a 'hacking' risk has been that it contains minimal information of value. However, it is suggested that the inclusion of these new descriptors, along with the other considerable data, particularly temporary logging data held on the Register, increases the potential for misuse and thereby the likelihood that the Register and / or chip will be the subject of unauthorised access.

8. An examination of the comments made in those submissions on the exposure draft which are publicly available from the OCA website identify many and varied concerns. Amongst those commonly raised are:

- The potential irrespective of legislative prohibition that the Card will become a de facto identity card.
- The volume and relevance of some data stored in the Register and / or chip which is not directly relevant to service provision.
- The adequacy of the IT infrastructure and potential for security breaches.
- The lack of adequate controls against possible 'function creep' and over reliance upon legislative prohibitions.

- The powers and discretion of the Australian Government in relation to suspensions and cancellations and the granting of exemptions.
- The untimely manner in which the Australian Government is looking to progress legislative change without consultation and consideration of all the issues, particularly in respect of the Consumer and Privacy Taskforce's work program.

9. The ACT Government shares many of these concerns, and indeed has raised most of them directly with the OCA, and it is regrettable that there has been no comprehensive response to these submissions by the OCA prior to the Bill being introduced into the Parliament. It is considered that the responses available on the OCA website are limited and do not acknowledge the breadth and character of the public submissions.

HUMAN RIGHTS IMPLICATIONS

10. There are a number of issues in relation to the implementation of the Access Card and its relationship with the Territory's Human Rights Act 2004 of note.

11. The proposal will engage the right to privacy, which is protected by Section 12 of the Human Rights Act and gives effect to article 17 of the International Covenant on Civil and Political Rights and protects the individual from unlawful and arbitrary interferences with privacy.

12. Human rights jurisprudence has found that the issue of an identity card containing only a person's name, sex, date and place of birth, current address, and the name of their spouse, does not in itself raise issues to the right to privacy. Section 28 of the Act is also relevant in relation to justifiable limits; that is, in each individual case of the collecting, holding, use or disclosure of personal information, the intrusion on the individual's privacy rights must be justified as the minimum necessary.

13. It is not possible at this time to conclusively assess the proportionality of the scheme's interference with privacy rights in the ACT and its use in the ACT for the purposes of providing ACT specific services.

14. As a guiding rule the extent of the personal information held on and off the Card, and whether all of the information will serve a legitimate aim and be proportionate to that aim is relevant. The potential for personal information to be obtained, recorded and disclosed without the knowledge or consent of the individual concerned is also relevant.

15. The extent of personal information, which may be disclosed, and the availability of safeguards against unnecessary disclosure are also of consideration. Finally, the potential for third parties to make contracts or services conditional on production of the card is relevant as is the potential consequences of failures in the security systems surrounding the card.

16. In this respect the Bill before the Parliament provides some clarification but there are still a range of operational-related issues that cannot be addressed without further detail

COMMITTEE'S TERMS OF REFERENCE

17. Noting the Committee's terms of reference to examine the intended scope and purpose of the card; the information to be included in the Register and on the Card chip and surface; and the range of offences relating to improper use of the card or its use for identification purposes the following ACT Government comments are offered:

Consultation and Legislative Processes

18. It is noted that this is only the first tranche of legislation and intended to set out the framework and safeguards for the Card's operation and establish the penalties. The second and possibly third tranches will deal with technological aspects, but also administrative review arrangements and the relationship on privacy matters to existing legislation.

19. The capacity to constructively comment on the adequacy of safeguards and penalties in the first tranche is tied to these technical and administrative considerations. There are also other matters which may be dealt with in subsequent legislation but which should be addressed now in the opinion of the ACT Government, including access rights

to data by dependants and carers, the possible uses of the card by persons overseas and transitional processes.

20. It is further noted that not all offence types are included in the current Bill and the Consumer and Privacy Taskforce is still considering some matters. The Taskforce is looking at offences related to the use of the client-controlled parts of the card and the inclusion of any such penalties may require appropriate description of the purpose of this part of the card in the body of the Bill.

21. It is the considered opinion of the ACT Government that the Australian Parliament should consider delaying the further progression of the legislation until all legislative aspects of the new access card system have been subject to proper community consultation and reviewed as a whole and the work of the Consumer and Privacy Taskforce has been concluded.

Registration, Forms and Consent Issues

22. Sections 13 and 23 of the Bill refer to the application for registration, which may be requested by the person or by someone else. There is no clarification provided as to the criteria of persons who may apply on behalf of another person. Such a broad application would not be suitable for the community at large. On the other hand, for persons under the age of 18 years, the persons applying for registration should be either the young person themselves or persons with a legal responsibility for the young person. This may involve a parent or a guardian appointed through a Court order. Similar considerations may need to be considered for adult persons with impaired capacity.

23. Section 13(3) and Section 23(3) of the Bill refers to the compliance requirements of the Secretary in developing the registration application form and consulting the Privacy Commissioner, taking into account comments made. However, the provision stating failure to comply with this requirement does not affect the validity of the form may ultimately remove any obligation on the Secretary to comply with the requirements as stated in the Bill.

24. Section 13 of the Bill also requires an applicant to complete the required form, which may request any information the Secretary requires. This may or may not be consistent with the views of the Privacy Commissioner. The information requested may therefore be additional to that included on the Register as outlined at section 17 of the Bill. No reference is made in the Bill to limit what the Secretary may do with that additional information.

25. Section 17 of the Bill refers to information held on the Register. Repeated reference is made to the applicant requesting the Secretary include certain information on the Register. Given the details have not been provided as to how this is to be requested, it may be assumed this will be done through the application for registration form. This is possibly misleading, as those completing the forms will consider the information is required, not optional.

26. Section 17 - Item 14 – also refers to flagging if the applicant has a relationship with a participating agency. It is unclear as to how this information meets the objects of the Bill and how it improves access to services. Government would have other means to confirm service delivery to members of the community.

27. Section 41 of the Bill refers to the use of the Access Card by Commonwealth Officers. This may be done for the purpose of the Bill or with the consent of the person concerned. There are no provisions made for the arrangements to apply when a person is incapable of giving informed consent.

Security Issues

28. The ACT Government has previously raised concerns that the inclusion of the client-controlled section on the card increases the risk of security breaches. It is understood that the card will not provide separate secure zones for the client-controlled and Australian Government controlled sections of the chip and this is generally considered to be poor design within the security and privacy sector.

29. Furthermore, it needs to be recognised that the inappropriate or illegal use of the client-controlled section of the card has the potential to jeopardise the integrity of the

new system in the community's mind and further consideration should be given as the structure and regulation of this aspect of the system.

30. In relation to the retention of copies of documents used to establish Proof of Identity (POI), the ACT Government does not believe that the Bill reflects adequately the Australian Government's public commitments about the destruction of POI records, either immediately after they have been verified or at some subsequent time.

State and Territory Concession Programs

31. The ACT Government needs to be confident that the legislation does not exclude the card's use by States and Territories for the provision of concession programs, either directly or through contracted service providers. In this regard it is noted that it will not be an offence to require a card holder to produce his or her card to verify that they are entitled to the relevant concession.

32. However, it is suggested that the legislation needs to explicitly state the right of concession provider to access data stored on the card chip. Furthermore, depending on the technology and upon how the data is bundled together, this may mean inadvertently accessing data which is not relevant to the concession in question and there should be legislative protection afforded to providers who access this data in good faith.

33. It is also worth noting that while not directly related to the examination of the Bill, the financial implications for State and Territories arising from the introduction of the new technology need to be properly addressed and to date the Commonwealth has failed to provide any direction in this matter.

Offences and Penalties

34. In respect of the penalties set out in the draft Bill, it is noted that there is an emphasis on sanctions for individuals intent on defrauding the Australian Government, compared to businesses or individuals looking to falsely access card data or make unauthorised databases from access card numbers.

35. The argument of comparability with penalties under the *Passports Act 2005* is not valid given the potential threats from passport-related fraud exceed those of social security fraud. The Bill includes the following possible penalties:

- For defacing or damaging your own card has a maximum penalty of 5 years imprisonment or 500 penalty points.
- Similarly, defacing or damaging someone's card has a maximum penalty of 5 years imprisonment or 500 penalty points.
- Changing information on the Commonwealth controlled area of the card with dishonest intent attracted a maximum penalty of 5 years imprisonment or 500 penalty points.
- Doing so without dishonest intent attracts a possible 2 year period of imprisonment.
- Selling your access card may attract up to 10 year imprisonment or 1000 penalty units.

36. By contrast it is understood that the making of a false statement relating to Medicare benefits under s.128A of the Health Insurance Act 1973 is punishable on conviction by a fine not exceeding \$2,000. It is further understood that offences committed under Division 2, Part 6 of the Social Security (Administration) Act 1999 are punishable on conviction by imprisonment for a term not exceeding 12 months.

37. It is suggested that it would be appropriate for the existing social security penalty regimes to be replicated in the new legislation. Any indirect attempt to increase sanctions is only likely to harden community suspicions regarding the merits of the proposal.

National ID Card

38. The ACT Government welcomes the stated intention to preclude the use of the card as a national identity card. However, the fact that the passport legislation is being used as a point of reference for the determination of penalties suggests that the purpose of the Card is more about establishing and controlling 'identity' than enhanced service provision and contradicts the Australian Government's assertions that this is not a 'national identity' card.

39. The ACT Government further considers it inappropriate to continue to represent the card as not compulsory when its broad application means it will not be an option. In a similar way, the argument that the client also 'owns' the card and this helps ensure against its misuse as a national identity card is unconvincing. The client does not own the data on the Australian Government controlled part of the card, nor can the client sell or exchange the data or the card.

Adequacy of Legislative Protections

40. It is noted that in the explanatory material on the exposure draft it was stated that it is "generally expected" that significant proposals for extending the operation of the card will require an amendment of the legislation by the Parliament. This qualified assurance against 'function creep' is inadequate, and there should be strict limitations articulated on the additional information that can be required to be held on the card either under the direction of the Departmental Secretary or through legislative instrument.

41. Several sections of the Bill concern an individual's Access Card being suspended, cancelled or deactivated. There is no definition of these terms, nor does it adequately specify who will be empowered to make such decisions or appeal rights. Given that the Card provides access to a whole range of benefits the potential for arbitrary and non-reviewable action is a serious concern to the ACT Government.

42. In this respect the views of the Consumer and Privacy Taskforce that "since the whole Access Card scheme is such a significant new development in Australian public life, all aspects of its establishment should be open to vigorous public scrutiny and debate" are shared by the ACT Government. The Australian Parliament is the most appropriate institution to exercise such a scrutiny and needs to ensure such debate occurs. In this respect the vesting of authority in the Minister to extend the operations of the card by tabling of legislative instrument in the Parliament is not considered sufficient protection and any change should be the subject of legislative amendment.

Function Creep

43. In the matter of 'function creep' the Bill is intended to regulate against this phenomenon but allows under clause 7 participant agencies to use the card to facilitate the provision of not only benefits but also services and programs. This definition is too broad with the potential to cover a raft of activities. Furthermore, it is suggested that the Australian Government needs to acknowledge that 'creep' can result over time from unchallenged social practices, irrespective of legislative prohibitions. For example, the potential to include date of birth information on the card means that it is likely to be used in some quarters as a default standard for proof of age.

44. It is the view of the ACT Government that 'function creep' can best be addressed through system design, education and enforcement and greater attention needs to be given to pursuing these first two options rather than relying on legislation and enforcement alone.

Discriminatory Provisions

45. The preferential treatment of Veteran Affairs clients and some other groups and the possible issuing of colour based 'status' cards raise concerns. While it is recognised some veterans like to have their entitlement status acknowledged on their current concession cards, it is unclear why they should receive special treatment over other groups, particularly those whose entitlements are unlikely to vary with time. The card needs to be represented as a fair and non-judgemental tool for improved service provision.

46. While positive discrimination in favour of veterans is laudable, it highlights the potential risks that the card may in the future be used as a tool to discriminate against others. The views of the Consumer and Privacy Taskforce are relevant here and they have noted in respect to the use of honorific and titles that it is an important principle that the "title" of a person has nothing to do with their rights to obtain benefits using their Access Cards and indeed the inclusion of a title may have the potential to become the basis upon which improperly favourable discrimination is practiced in favour of "title" holders. The

same argument holds for any design features of the system which highlight one group of citizens over another.

Concluding Remarks

47. There is clear and strong opposition by the Australian public to the concept of a national identity card.

48. While it is the Australian Government's stated position that the access card is not intended to be an ID card, the legislation before the Australian Parliament provides the infrastructure to facilitate a transition to such a regime. A more considered approach may allow for the improvement of human service provision while at the same time protecting the interests of all Australians.

49. The ACT Government welcomes the Senate's scrutiny of this important legislation and trusts that the views it makes in this submission – along with the 120 other organisations and individuals who comments on the exposure draft – will be taken into account.

* * * * *