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**Cyberspace Law and Policy Centre**  
A Centre for the Public Interest in Networked Transactions

Senate Finance and Public Administration Committee

**Submission to the Inquiry Into the *Human Services*  
(*Enhanced Service Delivery*) Bill 2007**

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The following submissions are supported by detailed argument in my attached draft article “Access all areas”: Function creep guaranteed in Australia’s ID Card Bill (Pt 1)’, which has been submitted for journal publication. I request that it be treated as an annexure to this submission.

**Submissions**

I make the following submissions for consideration by the Committee:

- 1 The Parliament should defer any decision on passing this Bill until legislation covering all aspects of the ‘access card’ proposal is before the Parliament. It is not possible for any person, or the Parliament, to make a well-informed assessment of this proposal until it can be seen as a whole. The current Bill does not cover many of the aspects of the proposal which contain the greatest potential dangers to the interests of Australians. It will already have to be amended in order to accommodate recommendations made by the Taskforce in relation to medical information, so it should not be passed in such a misleading and incomplete form. I submit that even those who support all of the government’s stated aims in relation to the ‘access card’ should support deferral of a final Parliamentary decision until the full legislative scheme is available to the Parliament. This submission is therefore independent of the following submissions.
- 2 The current Bill, and the government’s ‘access card’ proposals as we currently understand them, should be rejected. The principal reason for this is that, despite the government’s often-stated intention that they will not create a national identification system, there is an overwhelming likelihood that they will they will, and they should therefore be rejected. The existence (or likely development) of a national ID system does not depend simply upon whether a person is required to carry an ID card at all times, but depends upon an objective assessment of a number of factors, including whether one ID card and/or its associated ID number is likely to become predominant in use for identification purposes, effectively supplanting most other identification documents for daily purposes. This Bill will

facilitate continuous ‘function creep’ in the use of the ‘access card’ and its associated ID number and other information. The ways it does so include (i) discretions in the Secretary and the Minister to make decisions expanding the system which are not disallowable by Parliament; (ii) objectives encouraging uncontrolled use; (iii) inclusion on the chip of capacity beyond what is needed for legitimate government purposes, with very little proposed control over how it can be used; (iv) lack of precision in when use of the card may be required; (v) inadequate offences controlling requirements to produce the card; (vi) inadequate offences controlling copying of information on the card and in the chip; (vii) inadequate control over changes in business and government identification practices that make it inevitable that the card and number will be routinely offered for identification (‘pseudo-voluntary production’); (viii) absence of controls over who will be able to access information in the Register; and (ix) no provision for payment of damages to cardholders for breaches of the Act. These inadequacies make it close to inevitable that the ‘access card’ system (including the Register) will develop into a national identification system, contrary to the government’s promise to the Australian people, and contrary to their interests.

- 3 Personal information systems should be restricted to specific purposes, in accordance with information privacy principles. Where they provide near-comprehensive coverage of a country’s population, ID systems need to be placed under more careful control than systems of more limited scope, because of the potential scope and implications of their misuse. The Parliament should only support an identification system limited solely to the minimum necessary for the use of smart card technology in the administration of Commonwealth benefits and reduction of fraud in relation to those benefits, and with sufficient safeguards to ensure that it is not used for other purposes to a significant extent. This Bill does the opposite, and encourages and facilitates an unknown number of other potential uses.
- 4 The submissions in the paragraphs following propose specific amendments to the text of the Bill. Even if all of them were adopted this would not constitute good enough reason to support the Bill, because its objectives are flawed. The better course would be to abandon this Bill and start again, in order to develop legislation as suggested in the previous submission. These proposed amendments are merely to indicate what is necessary to make this Bill less dangerous, and in particular to reduce the likelihood of its development into a national identification system. Brief reasons for each suggested amendment are given in italics, but a more detailed explanation is in the accompanying article.
- 5 In cl 5, amend the definition of ‘access card’ by replacement of the words ‘and includes’ with ‘but does not include’.  
*If the chip and its contents are included in the meaning of ‘access card’, people will agree to things without realizing the scope of what they have agreed.*
- 6 Delete cl 6(1)(e)  
*Permitting the use of access cards for purposes completely unrelated to Commonwealth benefits should not be an object of this Bill (even if it is a side-effect), and makes it impossible to prevent function creep if it is an object.*

- 7 Add to cl 9 a new sub-clause (3): ‘Despite s9(3), any Commonwealth officer or an officer of a State or Territory government commits an offence if that person does any of the acts that constitute an offence under this Act’.  
*Agencies must be prevented from abusing access cards. Even though the Crown cannot commit offences, individual officers can. There must be a deterrent to abuse.*
- 8 Delete cl 17(1), item 12
- 9 Amend cl 17(2) so that it only applies to items 2,3, 7 and 8.  
*These decisions by the Secretary should be disallowable by Parliament, except in relation to items 2,3, 7 and 8.*
- 10 In cl 27(1) delete the words ‘or such other name as the Minister determines in writing’  
*A change of name would indicate function creep and should require new legislation.*
- 11 Cl 24 should define which items on the card-face are machine-readable, and by which means. Alternatively (but not preferably) add to cl 27(4): ‘The Minister shall include in any such determination specifications of the machine-readability of any item of information on the access card.’  
*The machine-readability of card information should be defined in the Bill, or at the least be part of a disallowable determination.*
- 12 Delete cl 27(5)  
*Changes to the form of the card (including to its machine-readability) should be disallowable.*
- 13 Delete cl 30, item 6  
*Date of birth should not be included on the card face, as it will facilitate fraud and the use of the card as a general ID card.*
- 14 Delete cl 34(2)  
*Any changes by the Secretary to information in the Commonwealth’s area of the chip should be disallowable.*
- 15 Add replacement cl 34(2): ‘The content of the Commonwealth area of the chip will be protected by the highest strength of encryption which is practicable.’  
*The content of the Commonwealth area should not be able to be read by anyone except who is not authorised to do so and who does not have a card reader with the Commonwealth’s decryption key. This will assist in discouraging function creep.*
- 16 Amend cl 40 by addition of the words ‘but you cannot be required to use it or produce it for any purpose other than the purposes for which its use is required by this Act’.  
*If this is the intention of the Bill, cl 40 should say so. This would underline the supposed intention of cl 45 and cl 46.*
- 17 Amend cl 41 by re-numbering it as cl 41(1), and by replacement in (b) of the words ‘with your consent’ by the words ‘at your express request and with your written consent’.

*This will ensure that proof of consent is held by Commonwealth agencies, and will assist in preventing function creep in the use of the card. Otherwise, practices will develop where Commonwealth agencies expect people to allow their cards to be used for non-required purposes.*

18 Add a new Part 3 Division 7 ‘Compensation for misuse of your access card’  
*The Bill does not make any provision for cardholder’s to obtain compensation for misuse of their cards or the information contained in or on the card. The following proposed section would provide such a right to compensation, which could be pursued either by complaint to the Privacy Commissioner, or directly before a Court.*

19 Add a new cl 42A as follows:

‘(1) You are entitled to obtain compensation from any person if that person:

(a) uses your access card in breach of section 41(1); or

(b) requires you to produce your access card in breach of section 45; or

(c) does, in relation to your access card, acts that constitute any offence under this Act.

(2) You may claim compensation for a breach of this section by the same procedures as you may claim compensation for an interference with your privacy under the *Privacy Act 1988*, or by civil proceedings in any court of competent jurisdiction.

(3) In any proceedings under this section, it is only necessary for you to satisfy the civil standard of proof, including in relation to proving that a person has done the acts that constitute any offence.

(4) There is no limit on the amount of compensation that may be paid to you under this section.

(5) Where a person purports to act on behalf of the Crown, the Crown is liable to pay any compensation to which you are entitled under this section.’

20 Amend cl 45(1) by replacement of the clause with the following:

(1) A person commits an offence if the person requires you to produce your access card or someone else’s access card for any purpose unless

(a) if the person is a \*delegate or an \*authorised person—the requirement is made for the purposes of this Act; and

(d) if the person is not a delegate or an authorised person—the requirement is made for the purposes of the administration of \*benefits or payments related to medicare numbers to establish that:

(i) you hold, or someone else holds, a \*benefit card; or

(ii) you have, or someone else has, a \*medicare number.

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

- 21 Delete cl 46  
*Amendment of cl 45 and deletion of cl 46 will make it very clear that no one can require production of an access card except for the purposes required by this Bill. If the above drafting omits any such purposes, they should be explicitly added after (d)(ii). The current drafting of cl 45 and cl 46 is obscure and invites exceptions to be found.*
- 22 Delete cl 54(1)(b)  
*A person's ID card should not be liable to forfeiture because they have used it in relation to some offence that has nothing to do with the objects of this Bill. This would allow forfeiture of the ID card wherever a person merely used it to identify themselves during a course of conduct involving an offence, even though it bore no other relationship to the offence. This is using forfeiture of identity documents as an additional sanction for offences.*
- 23 Amend cl 57(1)(a) by adding after the words 'on the surface' the words 'or any information in the chip'.  
*Information in the chip should at least have the same protection as information on the card face.*