



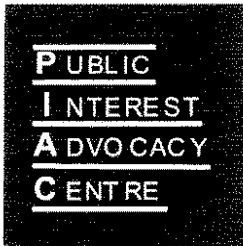
Level 9, 299 Elizabeth Street
Sydney NSW 2000
Australia
DX 643 Sydney
Tel: +61 2 8898 6500
Fax: +61 2 8898 6555
E-mail: piac@piac.asn.au
ABN 77 002 773 524

Submission to the Senate Standing Committee on Finance and Public Administration

Inquiry into the access card bill: Human Services (Enhanced Service Delivery) Bill 2007

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Carol Berry
Solicitor
Health Policy & Advocacy



Level 9, 299 Elizabeth Street
Sydney NSW 2000
Australia
DX 643 Sydney
Tel: +61 2 8898 6500
Fax: +61 2 8898 6555
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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 organization 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 Inquiry into the access card bill

PIAC appreciates the opportunity to present a submission to the Senate Standing Committee into Finance and Public Administration's inquiry into the access card bill. PIAC considers the access card proposal to be of great significance particularly with regard to proposed and potential public expenditure, and in terms of altering the Australian people's relationship with the Federal Government in regard of information collection and the protection of privacy. We consider the conclusions to be drawn of this inquiry to be of fundamental public importance and we look forward to the Standing Committee's observations on the proposal.

2. The proposed legislation - general observations

PIAC's position on the Federal Government's access card proposal has always been that it is not at all clear that the introduction of the card is in the public interest. PIAC is concerned by, amongst other things, there are a number of crucial details still to be finalised about the card proposal while the related legislation is being rushed through parliament, the lack of public debate around the implications of the introduction of the card, the very real possibility of cost blow-outs, and the lack

of a publicly available Privacy Impact Assessment about the proposal. In this submission PIAC focuses on improving the Bill should the access card proposal be implemented.

The Federal Government has indicated that the access card scheme is designed to be 'consumer friendly'. This is not apparent from the Bill, which seems to implement a system whereby the consumer is required to go through two separate processes, both of which require the production of identification documents, in order to firstly register for the card and then to apply for the card. Such anomalies within the Bill indicate that the proposal is not well thought through.

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 undertaken and released to the public in relation to the current access card proposal, before any measures are legislated or tenders let. 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).

The most important issue not addressed by the Bill is how the information collected will be used. It is unclear what individuals and agencies 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 Function creep

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 unconvinced by the assertion 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 access 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 emphasising 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 that 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.

2.4 Document Verification Scheme (DVS)

It has become apparent during Senate Estimates this month that the Federal Government plans to delay the implementation of the Document Verification Scheme (DVS) until 2010. Verifying the integrity of key identity documents that must be produced to get registered and to apply for a card has been purported by Government to be a crucial part of the access card identity system. Since the acknowledgement that the implementation of the DVS will be delayed, PIAC is concerned that this development compromises the entire access card proposal.

It was acknowledged in Senate Estimates by an official from the Attorney-General's Department that the DVS would be operational by 2010, and that there were no plans to utilise the system to confirm the integrity of identity documents until that time. This is despite the fact that the Federal Government plans to register every Australian who 'volunteers' for the access card between 2008-2010. PIAC believes that it is reasonable to draw the conclusion that the DVS will not be utilised to confirm the identity documents of any Australian who registers and applies for an access card, thereby fundamentally undermining the integrity of the entire scheme.

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 authorised person for the purposes of a specified provision of the Act in which the expression "authorised 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 Bill outlines the concept of the 'policy statement'. PIAC is concerned that wide powers are granted under this provision of the Bill. Such policy statements would affect the interpretation of the legislation without passage through Parliament, effectively making these interpretations beyond review. PIAC submits that such a provision is contrary to the proper functioning of Parliament and 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 that under clause 75 item 11 copies of documents used to prove identity may also be kept in the Register. PIAC is concerned by the lack of justification for keeping copies of documents beyond their use for the purpose of verifying identity, and the lack of clarity under 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, for privacy protection and identity security reasons, copies of proof of identity documents should not be kept beyond the time necessary for verification purposes and should not be stored along side personal information in the Register. 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.

In addition, the more information to be kept on the Register, the easier it is for unauthorised access to result in the production of high-quality false identities.

Who will have access to the Register?

As is outlined above, one of PIAC's core concerns with the Bill is that there is no specification provided as to what organisations will have access to the Register. PIAC believes that this is a key oversight, and a fundamental flaw in the proposed legislation. During Senate Estimates this month, it has become apparent that the Federal Government plans to give the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) access to the Register.

Various media reports have indicated that government agencies will have access to the Register in order to cross-match more than 16 million identities that will form part of the database.

If this is the case, what organisations may have access to the Register must be clearly specified in the legislation to ensure transparency and public accountability. It is of fundamental importance that the Australian people be made aware who may access their personal information, and under what circumstances this is authorised.

In addition, the Federal Government should engage the Australian people in a transparent discussion around the implications of cross-matching biometric photographs that will be held on the database. There have been questions raised, for example, as to the integrity and reliability of biometric technology. Given this, PIAC can envisage a scenario where innocent people may become the subject of police or other investigations on the basis of an incorrect biometric match. An honest dialogue must be entered into with the Australian people as to the implications of this sort of technological development. At the very least, details as to who may access biometric information about card holders (and under what circumstances) must be strictly outlined within the legislation.

A new section must be included in the legislation outlining precisely what organisations may have access to the Register, and under what circumstances they may be authorised. To accompany this, in the offences section of the Bill must include a specific offence for unauthorised access to the Register, in order to ensure that there is no inappropriate access of personal information. A specific offence is suggested further on in this submission.

Part 3 - The access card

Details of dependants

Pursuant to clause 100 (b), a person must be at least 15 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 required or 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 will 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.

Further, the Privacy and Consumer Taskforce discussion paper on health and emergency information indicates that even in relation to the content on the personal section of the chip the card holder will not have absolute control of content.

3.3 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 penalty of a 5 year imprisonment or 500 penalty points. In PIAC's view, it ought also be an offence to inappropriately access information on the card, or the Register. 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, whether or not an authorised person, does not do so for the purposes of this Act.

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

A similar provision should deal with the 'personal' section of the chip, and the Register.

It is PIAC's understanding that in the relevant UK legislation, there is an offence of interfering with the central database, which carries a potential penalty of a 10-year prison term. A similar offence is necessary in relation to the access card in Australia.

The Government has claimed that relevant privacy legislation will protect people against unauthorised access of personal information. However, PIAC is of the view that specific criminal offences should be created in order to attempt to prevent unauthorized access, and privacy legislation does not currently contain criminal offence provisions.

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 that 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 given 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. At present the Bill does not ensure these protections and requires a great deal more attention. PIAC is of the view that, in its current form, the Bill is inadequate in key areas.

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. Similarly, in Australia the proposal brings together in one site a much more comprehensive record than currently exists.

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 that 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

¹ Department of Human Services, *Overview of proposed legislative package* (2006) 6.

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 38

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 UK 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 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.

PIAC is concerned that the Government is currently engaging in a tendering process to implement the access card proposal, when key legislative elements have still not been drafted, let alone considered by the Parliament.

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. The representatives of the Australian people deserve to consider the entire tranche of proposed legislation before the proposal is implemented.

As the Minister for Families, Community Services and Indigenous Affairs outlined in his second reading speech introducing the Bill to the House of Representatives:

This Bill introduces a transformational change to the delivery of Commonwealth benefits. It proposes an evolution in Australia's health and social services system. The changes proposed in this Bill will take this system from the technology stone age to a modern, simpler and more secure way of delivering health and social services.⁵

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 the Government claims to have 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 9

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 February 2007, (Mal Brough, Minister for Families, Community Services and Indigenous Affairs)

This proposal has the very real potential of significantly changing the nature of the relationship between government and the people. It should be treated with due caution as a result.