CONSUMER AND PRIVACY TASKFORCE

SUBMISSION TO THE DEPARTMENT OF HUMAN SERVICES

HUMAN SERVICES (ENHANCED SERVICE DELIVERY) BILL 2007
EXPOSURE DRAFT

The Consumer and Privacy Taskforce (the Taskforce) established by the Minister in May 2006 takes this opportunity to present to the Department its views on the *Human Services (Enhanced Service Delivery) Bill 2007* Exposure Draft (the *Draft Bill*) together with suggestions regarding possible amendments of the legislation.

We draw the attention of the Department to the fact that many of the matters raised in the *Draft Bill* will be canvassed at greater length in our forthcoming **Discussion Paper No 2: Registration** which we expect to be released for public comment at the end of January and thus to be in the public domain before parliamentary consideration of the *Draft Bill* commences.

It is the practice of the Taskforce to ensure that all its advice to Government is made public and we therefore seek the advice of the Department as to whether and when all submissions on the *Draft Bill* will be made publicly available. In the event that this is not intended, the Taskforce will take steps to publish this advice on its own initiative.

The Taskforce has comments on only a limited number of sections of the *Draft Bill* as follows:

20 (2)	"It is not an object of this Act that access cards be used as national identity cards."

The Taskforce is strongly supportive of this principle but finds the formulation particularly weak. It would be preferable to state this principle in more positive terms, such as "It is an object of this Act to ensure that the Access Card is not used as and does not become a national identity card."

40 (2)	Indicates that Act (hence access card system, other than offences) does not relate to Norfolk Island

While the Taskforce understands that the Government has not, at this stage, determined the constitutional future of the Territory of Norfolk Island, the clause recognises that

Norfolk Island is part of Australia for the purposes of the offence provisions of the Act (Part 4). The Taskforce would prefer to see some formulation which allows for Norfolk Island to be brought into the operations of the Access Card scheme eventually. This could be done by inserting provisions to the effect that the extension of the Access Card scheme to Norfolk Island may take place at some future date by regulation.

55	Applying for Registration

The concern of the Taskforce in this instance is that the clause gives the Secretary the right to determine the nature of application forms (subject to National Identity Guidelines: section 315) but provides no role for the Parliament in the oversight of this matter. As the Register itself is specifically excluded as a legislative instrument (section 70(3)) there is no effective way of reviewing decisions by the Secretary. The Taskforce, as a matter of principle, believes 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. This will, we believe, enhance public support for the scheme and thus enhance its chances of acceptance and success. In order to do this, decisions such as this should be reviewable by the Parliament.

75	Information on the Register 1 (e) “if you are entitled to be known by a title and you request the Secretary to include that title on the Register – that title” 2 (b) “the place of your birth” 7 (b) “if your registration has been suspended or cancelled – that fact” 11 (a) “if the Secretary determines that a copy of a documents you produced in relation to proving your identity is to be included on the Register – that copy” 15 (a) “such other information that is determined by the Secretary and that is reasonably necessary for the administration of the Register or your access card”

The Taskforce has major reservations about several of the provisions of section 75.

A matter not previously raised which has now been included in the legislation is that the Register and subsequently the surface of the card (section 140(1)(c)) will also include a “title” where the cardholder is “entitled” to use one and so requests. The Taskforce **opposes** this suggestion in relation to both the Register and the surface of the card. We

regard it as unnecessary, potentially confusing and open to both misinterpretation and significant misunderstanding in terms of its practical effect.

Some titles are temporary, for example "Professor" and during the lifetime of the card, the cardholder may cease to retain an entitlement to use. Some titles may be honorary and awarded by a variety of organisations, some with varying standards, especially in the academic sector. It is unclear whether military titles are to be included. Members of the Islamic faith who are entitled to call themselves *Haji* if they have completed the pilgrimage to Mecca may want to have this title included. State legislation prevents people using certain titles (such as "Senator") as part of their name and the question as to whether such a title is to appear on an Access Card is problematic. People may be "entitled" the call themselves "Count" or "Prince" due to their status recognised in a country other than Australia or by their own claim to some mythical Australian "principality".

There are serious challenges at an administrative level inherent in this proposition. We assume that claims of entitlement will need to be verified – it would be unacceptable merely to take a claimant's word that they are entitled to be called "professor/doctor/colonel/ the honourable etc.).

There are clearly issues about people demanding to have titles such as "Mrs." or "Ms" on their card, and changing these from time to time. There are issues associated with religious titles, especially the use of the term "Reverend" by virtue of some overseas authorisation or recognition within a religious **group** within Australia.

Most serious however is the use of the title "Doctor". Traditionally in our community two groups of people are entitled to call themselves "Doctor": registered medical practitioners (who may actually hold a Bachelor's degree) and those who have completed a doctoral degree (e.g. a PhD). But of course a doctor may also be a veterinarian, a dentist, a psychologist as well as an archaeologist, astronomer, economist or zoologist. The title "Doctor" on an Access Card is more likely to give the impression that the person in question has some medical degree and both confusion and concern may arise from this. Medical doctors are, from time to time, struck off the medical register – there appears to be no suggestion in the *Draft Bill* that such a striking-off requires the cardholder to immediately amend their card accordingly.

It is also 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.

This proposal, as the Taskforce has noted has been inserted in the *Draft Bill* without prior announcement in any of the Government's previous statements, any previous undertakings or any Ministerial announcements.

Similarly, the Taskforce does not support the new proposal to include details of the cardholder's place of birth. No health and social service consequences flow from such data (as distinct from residency or citizenship status) and in many cases this is both a politically and privacy sensitive issue. No rationale has been stated for the proposal**.**

One has only to consider the potential problems of identifying where a person was born given the vast changes which have taken place in the politico-geographic configuration of Europe in the last two decades. Persons may have been born in what was (then) the sovereign state of Yugoslavia, but their place of birth may now be in Serbia, Slovenia, Croatia, Montenegro or the former Yugoslav Republic of Macedonia. It is unclear as to where such a "place of birth" should be claimed. In quite recent times the former states of Czechoslovakia, the German Democratic Republic (East Germany), and the Union of Soviet Socialist Republics have disappeared. Several new nations especially in Central Asia have appeared. Bangladesh has emerged from the former Pakistan and Tibet has been incorporated into the People's Republic of China.

Questions of place of birth may have some personal sensitivity. They may be relevant to the Department of Foreign Affairs and Trade for passport purposes, but the Taskforce cannot see its relevance for the Access Card system, even in relation to reciprocal pension or social security arrangements which are paid on the basis of citizenship status not place of birth. For example, a person may be a British citizen entitled to various payments, but have been born in Hyderabad, India and the Taskforce cannot see what useful information is provided to the Access Card system by recording this latter fact.

Several sections of the *Draft Bill* (e.g. section 75 (1) (7) (b), 75 (1) (8) (g)) contemplate that an individual's Access Card may be suspended, cancelled or deactivated. The *Draft Bill* provides no definition of these terms, nor does it specify who will empowered to make such decisions, the basis upon which they will be made or the rights of appeals associated with any such decision being made. Suspension or cancellation of an Access Card is a serious matter and may have particularly profound impact upon the cardholder, especially if the cancellation or suspension results from the activities of third parties, and as a result cardholders are unaware of the suspension or cancellation until they attempt to access regular benefits. The Taskforce appreciates that cancellation or suspension of a card that is being used fraudulently or improperly is an important tool necessary to prevent losses to the public revenue. However the Taskforce also notes that the Access Card provides access to benefits across a considerable range of services and may have relevance to parties other than the immediate cardholder.

The Taskforce notes that the *Explanatory Memorandum* (at para 8.9 page 63) indicates that "suspensions and cancellations of registration and the card" are "matters that may be dealt with in further legislation".
The Taskforce would have serious concerns were sections that appear in the *Draft Bill* simply enacted without this further consideration being given and we would prefer to see, and recommend that, in the light of the comments in the *Explanatory Memorandum* all such references be withdrawn from proposed legislation at this stage.

In relation to the retention of copies of documents used to establish POI, the Taskforce does not believe that the *Draft Bill* reflects adequately the statements made by the Government in response to its recommendations (speech by Hon Joe Hockey MP, National Press Club, 8 November 2006) about the destruction of such records, either immediately they have been verified or at some subsequent time when their destruction will be part of a more ordered process.

The Taskforce is unsure as to what this "other" information, referred to in section 15(a) might be. This is to be determined either :

- by the Secretary of the relevant Department where that information is "reasonably necessary for the administration of the Register or your access card" or
- by the relevant Minister, who must do so by "legislative instrument….for the purposes of this Act".

The Taskforce expresses its serious concern about the potential for "function creep" in this regard. While the Minister's additional requirements are by legislative instrument and thus subject to parliamentary scrutiny (and possible disallowance), the additional determinations by the Secretary are not open to either public scrutiny or debate or parliamentary disallowance. The Taskforce does not regard this as an acceptable position.

If the argument is that there is a need for greater flexibility to be built into the system to provide for future requirements or usage, then there is no objection to this per se. However this flexibility could be obtained, just as readily, by the use of the Regulation making power (*Draft Bill* section 350). If the Secretary advises the Minister that a Regulation should be made, then, provided the Minister (and the Government) is persuaded, such a Regulation can be made at any time. However because it is potentially disallowable this means that the Parliament (and through it, the public) has an opportunity to see plainly what is proposed, to raise objections and if necessary to act as a break on any unjustified "function creep" in this area.

80 (2) and (3)	Secretary may decline to include some information on Register re your name

While this power to refuse names which are unlawful or misleading is necessary, the Taskforce regards its formulation as too open-ended and notes a lack of guidelines about what may constitute inappropriate names. Such guidelines and definitions are found in some State legislation (for example the definition of "prohibited name" in section 4 of the NSW *Births, Deaths and Marriages Registration Act 1995*) and believes that this section should be rewritten along similar lines.

85	Temporary information on the Register

This section is supposed to be transitional, but again is open-ended as it gives no timetable for removal. This is not in line with the Government's response to the

Taskforce's recommendations on this point. The *Explanatory Memorandum* (at page 29) states "Once the card is docked and the information is transferred to the chip in the card, the information will cease to be on the Register." This assurance (which is in line with the Government's response to the Taskforce recommendations) is not reflected in the wording of the legislation. It should be.

115	Issue of Card : "The Secretary is taken to have issued your access card when (a) the Secretary sends your access card to you by post, or such other method as the Secretary determines…."

The Taskforce sees a problem here in that the Card is taken to be issued at the point when it is *sent out* from the manufacturing facility (or wherever) rather than when there is some proof of its *receipt*. This is a major fraud control issue which appears to have been overlooked, especially in the event of the card being intercepted in the post, being stolen, or being delivered to the wrong party in error. It should be revised to provide that the Card becomes active only when some further step is taken by the cardholder to activate it (either by a telephone validation as is common with certain financial transaction cards or by its first presentation in a participating agency) *at which point* it is to be taken as having been issued.

120	Period of validity of Card

This arises directly from a Taskforce recommendation and so is supported in principle. However there should be some indication of the process by which the Secretary may determine how to stagger the expiry date of the card, which process should be open to public scrutiny.

140	Information on Surface of Card 1 (c) title (6) if you request the Secretary to include your date of birth on the surface of your access card – that date

The Taskforce has already stated its concerns about the use of "titles" in its earlier comments about the Register (see above).

Similarly, the Taskforce has concerns about the inclusion of a date of birth on the card. This was not part of the set of proposals initially announced by the Government and hence has not until now been the subject of public discussion, nor attention by the Taskforce.

The Taskforce recognises that this inclusion of a date of birth is optional and that many people believe that its inclusion will be of benefit to them. On the other hand it needs to be recognised that a date of birth is used frequently as an identifier for on-line and security purposes and its widespread disclosure devalues the security protection of the card and materially enhances the opportunities and temptations for fraud and identity theft.

It should be noted, moreover, that the actual date of birth (as distinct from an age-related qualification i.e. being over a certain age) is not necessary for any health or social security related purpose – the principal concern of the Access Card. It is thus **important** to explore the question of whether the card could contain some form of identifier which signals that the cardholder is simply an adult (i.e. by definition over the age of 18) or over a prescribed age for the purposes of obtaining other benefits or concessions (e.g. 60+ / 65+ / etc) so that a status or entitlement is established but an actual date of birth not revealed. It is not clear that this option has been evaluated by the Government.

If it is decided to proceed with the proposal, people should, in the opinion of the Taskforce, have these competing claims drawn to their attention to allow them to make an informed choice about the inclusion of a date of birth or not on their cards.

There should also be more robust discussion about whether a potentially enhanced level of consumer benefit is worth the significant risk to card security which this proposal entails, and finally whether this consumer benefit can be obtained in a less security compromising form.

160	Information in the Commonwealth's area of the chip

Section 15 repeats the problem of "function creep" identified above in relation to the same provisions regarding the Register.

170	"The Commonwealth's area of the chip in your access card must only contain the information specified in section 160(1)"

Should this be "must contain only the information" ?

195	"A Commonwealth officer in a participating agency may only use your access card : (a) for the purposes of this Act; or (b) with your consent."

This section is confusing when read alongside the *Explanatory Memorandum* (at page 46) which states : "There may be occasions when a cardholder requests a Commonwealth officer to do something with their card which is outside the limited purpose of the Bill specified in clause 25….. For this reason…(it) is intended to allow a Commonwealth

officer to use the card for other purposes if that use is with the cardholder's consent." [section 5.105] The *Explanatory Memorandum* gives no examples of what is meant by this whole discussion so it is difficult to understand the exact rationale of this section. There is also some confusion about the term "Commonwealth officer" (from the definitions in section 15 this appears to be essentially any Commonwealth employee) and the more narrow restriction of this power to officers in participating agencies. In effect this section seems to be implying that (with consent) any Commonwealth employee can use another person's Access Card for any purpose. We do not think this desirable. If this is not implied, then references to "a Commonwealth officer" in the latter part of section 5.105 should be re-written to state explicitly each time, "a Commonwealth officer in a participating agency." This is notwithstanding the statement in section 5.102. Such an amendment would clarify matters and this clarity is significant when one notes that Courts may call upon the wording of a formal *Explanatory Memorandum* to assist them in the task of statutory interpretation.

270	Unauthorised recording etc of access card number

Card numbers (but apparently not other card data) cannot be recorded except by an "authorised person". However, section 340 empowers the Secretary to "authorise" *any* Commonwealth officer (see section 15 definition) for this purpose. This could include an authorisation being given to any police officer, immigration official, customs inspector, tax officer, census collector or anyone else. The Secretary may also authorise "an individual prescribed by the regulations" (section 340(1)(b)) and this could be as broad as a "health care worker", "quarantine inspector" or whatever. Again, there is no oversight or control of the Secretary's unfettered discretion and the potential lies for this important security provision to be rendered nugatory by an unlimited number of people (or categories of people) being given the power to ignore it. The Taskforce opposes this section remaining in such an open-ended form and without amendment. At the very least the section should also require that any authorised persons must be acting in relation to the Act and not in relation to matters outside its scope. Consideration should be given to amending sub-section (b) so that both the conditions set out in sub-sections (b)(i) and (b)(ii) apply rather than this being an "either or both" situation.

In addition, the Taskforce recommends that in addition to the above, the provisions of section 270 be extended to make this offence applicable to the unauthorised recording **without consent** of <u>any</u> information which may be gathered from the Access Card, including, for example any voluntarily included details of date of birth.

285 (3)	False or Misleading documents "Subsection (1) does not apply to you if the document is accompanied by a written statement signed by you: (a) stating that the document is, to your knowledge, false or misleading in a material particular; and (b)

	setting out, or referring to, the material particular in which the document is, to your knowledge, false or misleading.”

Subsection (3) appears to contemplate that some people will produce and use false/misleading documents but there are conditions in which this will not be an offence. Put simply, the Taskforce does not understand what these circumstances might be or what this section means in practice.

310	Exemptions and Guidelines

These exemptions provisions recognise the need for some young people to obtain their own Access Card and recognise the problems of remote and rural Australians in presenting for interviews. It also recognises that having photographs taken or providing signatures may be particularly difficult or sensitive issues for some people. Finally the exemption regarding provision of a legal name relates primarily to persons who are in Witness Protection Schemes.

The Taskforce notes that the *Draft Bill* does not appear to contemplate a situation in which a class of people (for example people in palliative care) may be exempted from the entire requirement to have an Access Card at all to continue to be eligible for benefits. This is a matter which the Taskforce believes should be considered.

When the Minister makes a determination about exemptions, he/she must publish the details of such exemptions. Such a determination is defined in the Draft Bill (s. 310(6)) as being an administrative matter and hence not subject to parliamentary disallowance.

Similarly the Minister may establish formal Guidelines which must be followed by the Secretary when she/he is making determinations about individual exemptions. These Guidelines essentially seek to modify the POI requirements which are otherwise established by legislation. As a result, these Guidelines are legislative instruments : that is, they are subject to parliamentary disallowance. They are also to be made public.

The Taskforce is supportive of that part of the scheme which vests the general exemption power in the Minister, and intends to give further advice to the Minister about what exemptions might be considered for various classes of people.

The Taskforce is less persuaded about leaving the question of individual exemptions entirely in the hands of the Secretaries (who have power to – and in practice clearly will – delegate this responsibility). There are clearly practical reasons why this delegation power is necessary given that decisions will need to be made in numerous issuing agency points around Australia and that there may be quite heavy demand for exemption (this cannot be determined accurately in advance of the commencement of the registration process). On the other hand this leaves a significant power over the lives and rights of individual Australians in the hands of Commonwealth officers. The *Draft Bill* does not appear to provide any mechanism to deal with appeals against decisions by either the

Secretaries or their delegates, and so one must assume that appeal lies only to the Courts under normal administrative law arrangements.

This seems to the Taskforce to be potentially far too burdensome for aggrieved individuals, especially given that many of these may be among the most disadvantaged and ill-resourced members of the community.

Similarly, we are concerned that the sensitivities which might be claimed by religious, ethnic or disability communities (for example in relation to being photographed) may end up being subject to the decisions of relatively inexperienced public servants or ones who are themselves not well enough qualified to assess these claims, especially in terms of their experiences in managing diversity. These concerns transcend matters simply of administrative consideration or convenience, especially since the Taskforce appreciates that there will be administrative convenience pressures to keep such exemptions to a minimum and there may be some disposition to refuse rather than to grant them.

The Taskforce notes that the *Explanatory Memorandum* (sections 8.1 – 8.2 page 62) states that "the Exposure Draft does not set up any administrative review mechanism", and this is recognised as "a significant issue that will need to be addressed in the future". However the *Explanatory Memorandum* goes on to say that this matter "will be subject to extensive review and consultation *within* government" (our emphasis) prior to inclusion in a second tranche of proposed legislation. We agree that these issues of oversight and appeal need to be addressed in the legislation itself, although we believe that this is not a matter exclusively for debate "within" government. We have canvassed some suggestions in this regard more extensively in our Discussion Paper of Registration which should, we hope, be released by the end of January 2007.

315	Minister may determine identity guidelines

While this is an important element of the whole package, there is no clear statement that these guidelines must be issued expressly and solely for the purposes of this Act or the Access Card scheme as a whole, rather than for general identity purposes. (The *Explanatory Memorandum* at page 59 fails to clarify this point). The Taskforce believes that this is an important safeguard which should be written into the legislation. Without it there is a possibility that at some stage in the future Identity Guidelines will be issued which are more concerned with supporting a national identity scheme than a health and social services access card scheme and this safeguard can and should be provided now.

320	Delegations by the Minister

This section provides an ability to delegate, but only to "a Commonwealth officer in a participating agency". This appears to preclude delegation in areas such as appeals against registration decisions to some person or authority (whether a "Commonwealth officer" or not) who is outside the "participating agencies" themselves. The Taskforce believes that this power of delegation should be capable of delegating to persons outside this narrow confine.

330	Delegations by the Secretary

The same point arises here as is discussed in relation to section 320 above.

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