



**Submission to the Senate Standing Committee on Finance and Public Administration**

**Inquiry into the Access Card bill: Human Services (Enhanced Service Delivery) Bill 2007**

**5 March, 2007**

**1. Australian Lawyers for Human Rights**

1.1 Australian Lawyers for Human Rights (ALHR) is a national network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia. It was established in 1993, and incorporated as an association in NSW in 1998.

1.2 ALHR has over 1,200 members nationally, most of whom are practising lawyers. Membership also includes non-practising layers, academics, policy makers and law students. ALHR is comprised of a National Committee with State and Territory committees.

1.3 ALHR promotes the practice of human rights law in Australia through training, publications and drawing attention to human rights standards. We work with Australian and international human rights organisations to achieve these aims. It is a member of the Australian Forum of Human Rights Organisations and is regularly consulted by government including through the Attorney-General and Minister for Foreign Affairs NGO forums.

1.4 ALHR appreciates the opportunity to present a submission to the Senate Standing Committee into Finance and Public Administration's inquiry into the access card bill but has been seriously hampered in its ability to address the bill in a detailed way because of the short period given for the making of submissions to the Committee.

**2. General Observations**

2.1 Consistent with ALHR's mandate, this submission will confine its comments and observations to the implications of the access card bill in terms of fundamental international human rights laws applicable to Australia.

2.2 In general terms, ALHR is concerned about a range of provisions within the bill which have implications for the individual's right to privacy, in some part due to the broad

language and lack of specification in the bill and also due to the lack of consultation and development of informed public debate on this important issue.

### **3. Right to privacy**

3.1 Under the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a party, Article 17 provides for an individual's right to be free from arbitrary interference with their privacy. The Human Rights Committee, the authoritative interpretive body on States' obligations under the ICCPR, has provided several General Comments, elaborating on this right which will be referred to in this submission.

3.2 There are several provisions of the bill which ALHR is concerned may be considered 'arbitrary' under the ICCPR, discussed below.

### **4. Necessity of the Access Card**

4.1 ALHR is concerned that a clear need for an access card has not been identified by the government. The lack of crucial details concerning the access card system, the lack of public debate and of publicly available Privacy Impact Assessment reports suggests that the creation of an access card system is not necessarily in the best interests of Australians. In order for any interference with an individual's privacy under the ICCPR, it must be shown that the "competent public authorities should only be able to call for such information relating to an individual's private life, the knowledge of which is essential in the interests of society as understood under the Covenant." (General Comment No. 16, para.10). ALHR is not convinced that the Federal Government has sufficiently demonstrated that this significant incursion into the private details of people's lives, as proposed under the bill, is "essential" as required under the ICCPR.

### **5. Access to information stored on the card**

5.1 The right to privacy is not simply a right to have one's private life protected from the public sphere. It contains a corollary right for individuals to have access to their own personal information stored. Reflecting this corollary, the Human Rights Committee states:

"In order to have the most effective protection of his private life, every individual should have the right to ascertain, in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes." (General Comment No. 16, para. 10)

5.2 ALHR is therefore concerned with provisions of the bill which prevent such information being available to the person with respect to whom the information is held.

5.3 Whilst the bill states in clause 37(1) that "you own your access" card, it restricts an individual to access information from the card and does not include access to information provided on the chip:

"However, subsection 37(1) does not give you ownership of any intellectual property or information that, at any time, is on the surface of, or in the chip in, your access card that you would not otherwise have." (clause 38)

5.4 ALHR believes that the bill should contain additional provisions allowing for individuals to access the information contained in the chip of their card and any associated database. This would ensure the bill is consistent with Australia's privacy obligations as articulated under the ICCPR and elaborated upon by the Human Rights Committee.

## **6. The role of 'authorised person'**

6.1 The bill grants broad powers of access to individuals described as 'Authorised persons'. Under clause 72, the bill states:

Authorisations by the Secretary

- (1) The Secretary may, in writing, appoint:
  - (a) a Commonwealth officer in a participating agency; or
  - (b) a Commonwealth officer prescribed by the regulations; or
  - (c) 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

6.2 The bill provides scant information as the degree of access authorised persons will have regarding card-holder information. The only functions identified within the bill for 'authorised persons' are to comply with governmental policy and directions by the Secretary. It must therefore be concluded that authorised persons will have unfettered access to all information contained on the Register.

6.3 In order to avoid such access being unfettered and, therefore arbitrary within the meaning of Article 17 of the ICCPR, there must be a justifiable reason for that access above and beyond that generally associated with government policy and directions of a departmental Secretary. Once a specific need for such an access card is specified this will provide grounds upon which access for authorised persons may be justified. Without a clear articulation for the basis of an access card it is impossible to frame the basis upon which access should be given to authorised persons.

6.4 Further, in General Comment 16, para. 10, the Human Rights Committee states:

Every individual should also be able to ascertain which public authorities or private individuals or bodies may control their files.

6.5 ALHR submits that the bill should provide a clear articulation as to the degree of access authorised persons will have regarding information stored on the Register. ALHR further submits that in order to more fully comply with the requirements of non-arbitrary interference with an individual's right to privacy, the bill should create categories of authorised persons, differentiating degrees of access to information, in order to protect private information.

## **7. Access to the Register**

7.1 Finally, a range of organisations have expressed concern as to which organisations will have access to the information contained on the Register. For example, during Senate Estimates in February, it has become apparent that the Federal Government intends to give the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) unfettered access to the Register.

7.2 Again, ALHR submits that in order to ensure that individuals are informed clearly as to who will be able to view personal information contained in the Register, a right to which they are entitled under Article 17 of the ICCPR, the bill should clearly stipulate the organisations with access to the Register and the degree of access to which they are entitled. At present, the bill states that the purposes of the Act are:

...to facilitate the provision of benefits, services, programs or facilities to some or all members of the public (whether under a Commonwealth law or otherwise), where that provision involves a participating agency. (clause 7)

7.3 In the list of 'participating agencies', there is no mention of ASIO or the AFP. ALHR submits that a failure to clearly identify the possibility of other, non-health or benefits organisations would violate the obligation that "relevant legislation must specify in detail the precise circumstances in which such interference may be permitted" (General Comment 16, para. 8).

7.4 If similar information was held by a private organisation then in most cases a warrant would be needed for the AFP or ASIO to gain access to it. The principle behind the issue of such warrants is that the person seeking the warrant must be doing so for a legitimate purpose and have established to an independent third party that there is a reasonable basis for concluding that access to the documents will assist in the pursuit of the legitimate purpose. Access to such material by the police who are investigating a criminal offence has been controlled in this way for a considerable period of time. In ALHR's view the protection of the right to privacy at international law does not permit access to such personal information where a legitimate purpose has not been established. The possibilities of serious abuse by ASIO or the AFP when the legislature gives unfettered access such material are clearly evident.

7.5 ALHR recommends that access to the register be limited, particularly in the case of ASIO and the AFP, to existing investigative tools such as search warrant. At a minimum an independent third party should oversee such access to guard against abuse.

## **8. Concluding comments**

8.1 In conclusion, ALHR believes that there are a range of areas in the access card bill which raise serious concerns regarding potential breaches of Australia's obligations under the ICCPR, in particular, the right to privacy. In order to ensure that the bill is not considered an arbitrary interference with an individual's right to privacy, ALHR recommends that the bill contain robust safeguards to allow Australians to have free access to information held with respect to them and to restrict access to that information to those organizations which have demonstrated a legitimate need for such information.

8.2 More broadly, however, ALHR remains concerned that the passage of the bill has displayed a lack of commitment on the Government's part to allow the public to engage with, and gain all relevant information on, the proposed access card. This is an important issue which could have serious ramifications for the public and therefore requires more public debate. This would include, but not be limited to, access to the Privacy Impact Assessment report, or the commission of a new report.

ALHR believes that a failure to allow for an informed public debate would not be consistent with the spirit of fundamental international human rights norms.

6 March 2007