

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

**on the**

***HUMAN SERVICES (ENHANCED SERVICE DELIVERY) BILL 2007***

**by**

**LIBERTY VICTORIA**

**1. Introduction and summary**

1. Liberty Victoria opposes the Human Services (Enhanced Services) Bill 2007 for three principal reasons:

(i) because, if enacted, it will inevitably lead to the introduction of a national identity card;

(ii) because it contains draconian provisions which would criminalise the use of the access card as an ID card, though such use would be rational and usually harmless behaviour resulting from the other provisions of the Bill; and

(iii) because it vests extraordinarily wide discretions in both the Minister and the Secretary of the Department of Human Services, which are tantamount to a delegation of legislative powers to them.

**2. The Bill would create a de facto ID card**

2. On p 3 of the Explanatory Memorandum accompanying the Bill, the Government stated that

“Strengthening **proof of identity** will be a fundamental element in the registration process for an access card.” [Emphasis added.]

3. This echoes a statement on p 3 of the report by KPMG to the Department of Human Services in February 2006, containing the business case for a health and social services smart card initiative:

“The introduction of **substantially improved proof of identity** arrangements to obtain the card and **improved proof of identity** information on the card and in the chip in line with the Attorney-General’s Department **strengthened proof of identity** requirements.” [Emphasis added.]

4. The Report of the Government’s Consumer and Privacy Taskforce, on pp 5 and 6, in a section headed “The Government’s case for the Card”, said:

“Without **robust proof of identity** to verify eligibility, measures that merely cut red tape and improve access for consumers would fail to eliminate weaknesses in the present system (such as **identity fraud** problems which are undetected currently) and not deliver the benefits to the community that the Government is seeking.” [Emphasis added.]

5. In the Explanatory Material accompanying the exposure draft of the Bill released on 12 December 2006, the Government said in para 2.6 on p 8:

“In a recent speech to a Counter Terrorism Summit, the Australian Federal Police Commissioner, Mick Keelty, estimated that that **identity fraud** costs Australian between \$1 billion and \$4 billion annually. Worldwide, the cost has been put as high s \$2 trillion.” [Emphasis added.]

6. In a press release dated 9 May 2006, the then Minister for Human Services, Mr Hockey said:

“The inclusion of a digital photograph on the access card will **significantly enhance the identity security elements of the card**, protecting the cardholder's **identity** and reducing opportunities for fraud.” [Emphasis added.]

7. In a speech to the National Press Club on 8 November 2006, Mr Hockey said the proposed card:

“will be an **even more secure identification tool** than your current passport.” [Emphasis added.]

8. The Bill lives up to this promise, containing detailed prescriptions for the proof of identity for a nationwide register to be maintained by the Commonwealth Government: see Part 2 and Part 5 , Div 1. The register then provides the database for the access cards. Though registration will be voluntary most people will register or else they will ultimately be unable to access Government benefits, such as Medicare, without a card.

9. The Bill, if enacted, would therefore create a card which would be an identification tool without precedent, better even than a passport. Almost all adult Australians would have a card and most would carry it most of the time, even if not obliged to. These are the objective circumstances which enactment of

the Bill would create and which the Committee, in its consideration of the Bill, should acknowledge.

10. The Committee should also acknowledge that these objective circumstances are almost bound to have certain consequences, the most likely one being that the access card will evolve into a de facto ID card. To pretend otherwise is to invoke the spirit of King Canute.

**3. Penalties for requiring production of the card as proof of identity**

11. To deflect criticism that the access card will evolve into an ID card, the Government has included cls 45 and 46 in the Bill. These provisions would impose penalties, including imprisonment for up to five years, for requiring a person to produce an access card as proof of identity, except in connection with the provision of Government benefits.
12. These provisions are draconian. They would penalise behaviour which is rational and, in any moral sense, harmless in most situations. Moreover, they will penalise behaviour which is an almost inevitable consequence of the enactment of the Bill. Parliament cannot arm people with an identification tool as powerful as the access card and not expect those who need proof of identity to require that it be provided by the access card.
13. These days proof of identity is required in myriad circumstances quite apart from the receipt of Government benefits: to open a bank account, to conduct

numerous financial transactions, such as cashing a bank cheque, to hire a video, to hire a car, to enrol in studies, to take a flight, to prove drinking age etc. etc.

14. A person charged with the responsibility of checking the identity of others would only be acting rationally by requiring that it be proved by the access card, given the unparalleled security the card would offer. Moreover, given that most people would have an access card, requiring proof of identity by an access card would not only be rational, it would also be harmless in any moral sense in most situations. Exceptional cases aside, where it is for the purpose of accessing personal information stored in the card, how could it be morally more harmful to require production of an access card than, say, a driver's licence?
  
15. Yet a person who required production of an access card for identification purposes except in connection with the provision of Government benefits could face five years in prison. This draconian result would be attributable not to any sense of moral or even legal culpability for the act in question but rather to political expediency. It would result from the impossible task of reconciling the Government's desire to arm people with a secure identification tool and the pretence that this will not result in a national ID card.
  
16. Clauses 45 and 46, borne of political expediency, and criminalising behaviour which is rational, morally harmless in most cases and incited by the legislation itself, would be very bad law. If enforced, they would penalise innocent people for the Government's own lack of honesty and candour and its failure to acknowledge the inevitable consequences of the introduction of the access card.

17. It is, however, more likely that these provisions will not be enforced. Nothing has yet been said of any Government program for enforcement. Would it send Federal Police into banks, video stores, to line up outside bars and into other situations where identification is likely to be required? Would it set up a dob-in line and encourage people to report contraventions of cls 45 and 46? Why would anyone use the dob-in line? Who would care whether an access card was demanded to prove identity in preference to, say, a driver's licence? Why would the Federal Police and prosecuting authorities devote resources to enforcing such provisions?

18. Many people whose job it is to check identification would not know of the prohibitions in cls 45 and 46, should they be enacted. Yet the offences would involve strict liability. Those who knew the law would inevitably be frustrated by it and there would be pressure to change it. That pressure would be very strong from the financial and professional sectors, because of the stringent "know your customer" requirements of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. Prosecutions for contraventions would probably attract media attention which would add to the pressure to change a draconian and unfair law.

#### **4. Function creep and the transformation into a de jure ID card**

19. If enacted, cls 45 and 46 are likely to be ignored in practice. If enforced there is likely to be public pressure to repeal them. In either event, the access card will become a de facto ID card.

20. The Government, however, has said this will not happen because it has given a commitment that there will be no function creep affecting the card's operation. This is meaningless for two reasons.
21. First, because the access card is likely to become a de facto ID card through Government **inactivity** rather than positive action. That is, the likely failure to enforce cls 45 and 46 will have that effect. If there is no real risk of a prosecution for requiring production of the card, it will routinely be required to be produced to prove identity.
22. Secondly, a Government can never guarantee there will be no function creep because it cannot limit the power of future Parliaments to amend and repeal legislation. It is no protection against function creep that legislation is required to produce it. Legislative function creep is commonplace and no less effective than other types. Instances of legislative function creep are too numerous to mention.
23. In the present case, the access card could be transformed from a de facto ID card into a de jure one by very limited amendments to the present Bill. These amendments would achieve that result:
- Deletion of cls 6(2), 45 and 46.
  - Deletion of "not" in cl 42.

24. Furthermore, the Bill is only the first tranche of a set of legislation for the creation of the access card. It only makes transitional provision until 2010 when it is expected further legislation will be introduced to abolish all other Government benefit cards and replace them with the access card. Legislative function creep is therefore already built into the access card.
25. It is easy to imagine this situation in 2010: most people will have registered for the access card, the criminal sanctions of cls 45 and 46 will have been shown to be either ineffective or draconian and unfair and those who have the responsibility for verifying identities are clamouring for the ability to require production of the access card without risking criminal sanctions. Parliament will be considering the next tranche of legislation in 2010 (if not sooner). It would be almost bound to consider the amendments to the Bill referred to above.
26. The Committee, in its report, should acknowledge this possibility and should acknowledge the likelihood of the circumstances giving rise to the possibility. It should recommend to the Government that, if it is opposed to the introduction of a national ID card, de facto or de jure, then it should not proceed with the Bill.

**5. Investment of discretions in the Minister and the Secretary**

27. Another objectionable feature of the Bill is the widespread investment of discretions in the Minister for Human Services and the Secretary of the Department.
28. The following discretions would be invested in the Minister by the Bill:

- Power under cl 8 to issue policy statements binding the Secretaries of the Departments of Human Services and Veterans' Affairs in the exercise of their functions under the Bill.
- Power under cl 17, item 17 and cl 34, item 17 to determine whether certain information should be included on the register.
- Power under cl 65(1) to exempt individuals in a specified class from certain registration requirements.
- Power under cl 65(2) to exempt veterans in a specified class from certain registration requirements.
- Power under cl 66(1) to determine identity guidelines binding the Secretary for registration and related purposes.
- Power under cl 67(1) to determine whether an individual is a veteran.

29. The Bill invests the following discretions in the Secretary of the Department of Human Services:

- Power under cl 13(2) to specify what information or documents must accompany an application for registration.

- Power under cl 14(c) to determine whether a person has sufficiently proved identity for registration purposes.
- Power under cl 16(2) to determine the form or the manner in which the Register will be kept.
- Power under cl 17, item 2 to determine whether or not a person's date of birth should be included in the register.
- Power under cl 17, item 3(b) to determine whether other information about a person's residency should be included on the register.
- Power under cl 17, item 7 to determine whether information about a benefit card should be included on the register.
- Power under cl 17, item 8 and cl 34, item 14 to determine whether the register should record a person's proof of identity as "full" or "interim".
- Power under cl 17, item 9(i) to determine whether a colour is associated with a benefit card.

- Power under cl 17, item 12 to determine whether documents and information produced to prove identity should be included on the register.
- Power under cl 18(1)(a) and cl 35 to exclude information from the register because of a person's inclusion in the National Witness Protection Program.
- Power under cl 18(2) to exclude a person's name from the register if satisfied the name is prohibited by law.
- Power under cl 18(3) to exclude a person's name from the register if satisfied the name is inappropriate.
- Power under cl 23(1)(b) to determine the manner in which an application for an access card is made.
- Power under cl 23(2)(a) to determine the form in which an application for an access card is made.
- Power under cl 23(2)(b) to determine the information and documents which must accompany an application for an access card.

- Power under cl 23(4) to determine what additional information and documents must accompany an application for an access card.
- Power under cl 31(1) to exclude a person's name from the person's card if satisfied the name is prohibited by law.
- Power under cl 31(2) to exclude a person's name from the person's card if satisfied the name is inappropriate.
- Power under cl 31(3) to abbreviate a person's name on the person's card if it is too long.
- Power under cl 54(1) to require a person to surrender an access card if it has been obtained or used illegally.
- Power under cl 54(2) to require a person to surrender a false access card.
- Power under cl 65(3) to exempt specified individuals from certain registration requirements.
- Power under cl 65(4) to exempt specified veterans from certain registration requirements.

30. Each of the above discretions invested in the Secretary is subject to ministerial direction by policy statement under cl 8. Thus, the Minister is also ultimately able to exercise those discretions.
31. In total there are 29 separate discretions invested in the Minister concerning the functioning of the Bill. Many of these discretions affect the operation of the Bill in fundamental ways, e.g those permitting certain persons not to register and those affecting the information which must be provided for proof of identity, for inclusion on the register and for inclusion on the card.
32. The Bill would virtually delegate to the Minister and the Secretary a host of responsibilities which would normally be covered by legislation. This would be an abdication of responsibility by Parliament and an especially serious one given the public concern about ID cards.
33. This feature of the Bill also emphasises the hollowness of the Government's promise that there will be no function creep: so much could be achieved by ministerial or bureaucratic direction that legislative amendment would be unnecessary to produce significant function creep.
34. The Committee should recommend that, if the Government does wish to proceed with a proposal that is likely to result in a national ID card, then it should nevertheless recast this Bill by removing most of the ministerial and bureaucratic discretions.

**6. Other matters**

35. The Bill, if enacted, would also have certain other objectionable consequences.
  
36. Clause 22(b) would prevent most people under 18 from receiving an access card. Media reports indicate the Government is likely to remove this provision. Liberty Victoria supports that removal
  
37. People subject to domestic violence, especially women, will be particularly vulnerable because of the operation of the Bill. The requirement for them to be registered and the time it would take for them to have a bureaucratic discretion exercised in their favour to remove their registration or for it to be modified would compromise their safety. It is hard to see a way around this and so it would have to be accepted as a social cost of the legislation.
  
38. The Government has frequently trumpeted the innovation of the Bill in investing in people the ownership of their card. So what? Its value to the owner would be negligible but its real value would lie in the ability it would give others to obtain information about the owner. That value is why cards, the information they store and the register are likely to be the subject of attempts to compromise their security.
  
39. While the Government has boasted about vesting ownership of the cards in people it has been silent about the fact that it will effectively deprive people of the ownership of their name. In common law countries like Australia, while names are required to be registered at birth and may be altered by registration,

people essentially own their names and cannot be prevented from calling themselves whatever they choose, irrespective of registration. See, e.g, the Births Deaths and Marriages Registration Act 1995 (NSW) s 32; the Birth Deaths and Marriages Registration Act 1996 (Vic) s 30.

40. The power invested in the Secretary to refuse registration of a name and refuse to include it on an access card by cls 18 and 31 would radically change this. If the access card became the primary means of identification for Australians, as is likely for the reasons given above, it would also become the primary means of proof of name. The Secretary would then have the ultimate say about a person's name and the common law position would effectively be overridden.
  
41. This will bring Australia into line with most civil law countries, where the Government has the ultimate say about names. Incidentally, most of those countries also have compulsory ID cards or documents.

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