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Submission to Department of Human Services

on

**Exposure Draft of Human Services (Enhanced Service Delivery) Bill
2007**

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Introduction

Health Issues Centre (HIC) has been an independent, not-for-profit organisation for over 20 years, promoting consumer perspectives in the Australian health system. Our mission is to improve the health outcomes for Australians, especially those who are disadvantaged. HIC works with a wide range of consumers, health providers, researchers, governments and other health organisations to achieve this through: policy analysis and advocacy from consumer perspectives; consumer-focused research; supporting consumer participation; and providing information.

We begin with some observations on the way in which the proposed access card system has been developed and presented, before focusing on the general content of the proposed system. The submission concludes with more specific comments linked to provisions in the Exposure Draft of the Bill.

The genesis of the proposed access card system

HIC welcomes any moves to improve consumer access to the health system, such as reducing paperwork, the number of required visits and queuing time, or improving the coordination of data across agencies. However, as an organisation committed to empowering consumers and respecting the ability of all Australians to make informed decisions about health matters pertaining to their own lives, HIC believes that there are serious flaws in the genesis of the proposed card system.

First, there was a lack of preliminary consultation with taxpayers and potential consumers of the card - the vast majority of Australian residents at some point in their lives – about whether they actually wanted such a card. If the *raison d'être* for the card is to help ordinary Australians, it makes neither economic nor democratic sense to present the card as a *fait accompli* and then ask consumers whether they want it.

Informed and transparent public debate about any proposed card, and taking consumer views seriously, required extensive consultation and involvement of the general public and non-government organisations in *formative* discussions about the privacy, IT and broad social implications of any Government smart card system, rather than, as the KPMG Report implied, limiting public consultation to allaying concerns and instructing them in how the system will work.¹

¹ *Health and Social Services Smart Card Initiative Volume 1: Business Case – Public Extract*, KPMG, February 2006, pp 93-7.

Unfortunately, the lack of genuine consultation continued with the utilisation of the Access Card Consumer and Privacy Taskforce to ascertain consumers' views, as consumers were not provided with sufficient information with which to evaluate the Government's various claims about the card. For example, Clayton Utz's Privacy Impact Assessment commissioned by the Government has not been publicly released, and the KPMG Report is only available to the public in a censored version. There is also a lack of information presented about consumers' views in countries which have access card systems, other than using the fact of their existence to justify a similar system in Australia. However, where such wider consultation has taken place in those countries, there has been strong opposition to schemes similar to that currently proposed here.²

Despite the tenor of the various Task Force documents and of Minister Hockey's 27 November 2006 and 13 December 2006 media releases, to HIC's knowledge, there have been no general public consultations about the proposed card or the draft Bill. As community organisations working with consumers in the health sector know, simply expecting consumers to write submissions on discussion papers or proposed legislation, or to make comments via the access card website, does not constitute good practice in consumer consultation. Two forums organised in December 2006 were presented by Government as part of its commitment to public participation, but consumers were not directly invited, and HIC, although having made a submission to the Access Card Consumer and Privacy Taskforce, was not able to travel interstate.

In any case, the language advertising the forums strongly suggested that they were briefings rather than being genuinely consultative, referring to 'providing privacy and consumer advocates with further details' and 'explaining' how technology will work. This is not consumer participation - for example, as it is understood now in a range of government and community settings in the health sector.

The major review of the *Privacy Act 1988* (Cth) being undertaken by the Australian Law Reform Commission will also not be completed by the deadline set for the proposed introduction of the first access card Bill. It seems inconceivable that a proposed national project involving such fundamental issues of privacy and technology is not able to wait for the key national law reform body to conclude its investigations into how effectively Australia's most important national privacy statute protects privacy, and any necessity for further legal privacy protection. It is also ironic that the ALRC is planning extensive community consultation as part of its privacy inquiry, beginning the month that the Human Services (Enhanced Service Delivery) Bill 2007 is planned to be introduced.

² See eg 'French report highly critical of new French ID card project', 18/06/05; 'Canadian Privacy Commissioner warns about "War on Terror"', 04/11/04; 'Japanese Court rules ID system unconstitutional', 30/05/05; www.privacyinternational.org accessed 27/07/06.

Finally, the release of the Exposure Draft of the Bill on the heels of the Taskforce's first report and the Government's response is more evidence that such consumer views as were reflected in the Taskforce report have been further marginalised. The publication of the Exposure Draft just before the Christmas break, with a submission deadline of 12 January, neither 'enable[s] full public consultation and comment' by individual consumers and under-resourced community organisations,³ nor facilitates 'transparent and open dialogue'.⁴ It is also difficult to make meaningful comments when the legislation is proposed in tranches and there are obvious interconnections to legal issues which have not yet been presented by the Government.

The content of the proposed access card system

The rationale in support of the card's introduction is, in our view, confused and verging on dishonest, particularly in relation to assertions that is not an ad hoc national identity card in some important aspects. There are serious civil liberties and especially privacy concerns associated with a national identity card which are not outweighed by any proven gains.

The practical ramifications of an access card system have also not been sufficiently thought through, specifically in relation to claims made about the benefits accruing to consumers and how Australians can have confidence in the technical capacities of the proposed card system.

While some health consumers would welcome a reduction in the number of cards they are required to produce and the removal of unnecessary duplication of data entry, Commonwealth Government documentation about the proposed card seems to present an unrealistic view of the usefulness to consumers of the new system. For example, the Government claims that people will be able to update their address details online, as an example of how things will be more convenient. Yet institutions such as banks already provide password-protected Internet access to services, but for security reasons consumers are still required to post a signed letter in order to change address details.

Government documentation repeatedly assures us that the card will save time for those people who attend agencies like Centrelink and find that they do not have enough documentation for acceptable identification, or have to repeat the exercise for each agency instead of having one central system.⁵ Where is the research to substantiate this claim? Given the minimal data planned to be stored on the card (ie no bank account details, rental payment proof and so on), most of the data for agencies like Centrelink will still have to be repeated each time. It is also likely that much of the time spent at Centrelink is having to travel there and queuing, not form filling per se.

³ Contra 'Overview of Proposed Legislative Package', 13 December 2006, p3; Minister for Human Services, Media Release, 13 December 2006.

⁴ *Exposure Draft Explanatory Material*, 12 December 2006, 1.19.

⁵ See eg *Exposure Draft Explanatory Material*, 12 December 2006, pp 7, 16.

HIC reiterates that consumers have not been widely consulted, and so the basis for the assertion of consumer benefit is also questionable on these grounds. We are not convinced that simply introducing new technology (which in any case has been insufficiently explained to the public and appears to be poorly understood even by some of its advocates, as well as being subject to rapid change in IT developments) will overcome current deficiencies in the system which are more attributable to problems of governance and administration.

There is also a lack of reassuring information about how privacy will be protected. Despite assertions that there will be no cross-linkage of data or security/privacy breaches, details are sketchy of how this will be ensured.⁶ This is especially concerning given the anti-terrorism climate with its attendant greater risks to civil liberties as 'justified', and in the absence of a federal human rights act to protect vulnerable citizens.

Finally, there is a dearth of research to support claims made about the cost and savings of the card, despite the Exposure Draft's less-than-neutral title of 'Enhanced Service Delivery'.

HIC therefore opposes the introduction of an access card in its proposed form and recommends that thorough and transparent public consultation, supported by research, take place before any system is contemplated.

However, given that the card system continues to be represented as a foregone conclusion, we also make specific comments on various provisions of the Exposure Draft.

Specific comments on the Exposure Draft

Clause 20(2)

The Commonwealth Government asserts that the card is not a national identity card, but the proposed card has many characteristics typical of one. For example, it is proposed that the card contain the person's name, photograph, signature and card number. Some of the Government's own arguments in favour of the card also suggest that it has elements in common with a national identity card, in that it is claimed that the card will save people time and trouble in dealing with agencies like Centrelink, and will reduce welfare fraud.⁷ However, if the rationale of the card were simply to assist people who presently find it difficult to gain enough identification 'points' (eg through lacking a driver's licence or a passport), then simply having the option of possessing a standardised non-biometric, non-micro chipped card with a photograph and signature would be sufficient. We also note that these people will still have to come up with the requisite identification in order to register for the card, so it does not completely eliminate the difficulty they have at present.

⁶ See eg *Exposure Draft Explanatory Material*, 12 December 2006, pp 8-9.

⁷ *Exposure Draft Explanatory Material*, 12 December 2006, 2.4.

Similarly, the claim that the card will save money through eliminating fraud can be questioned. There has been no public dissemination of detailed figures on the various types and causes of 'welfare fraud', and therefore no opportunity for informed public discussion of this aspect of the proposed card. For example, a detailed discussion of fraud is absent from the publicly released version of the KPMG Report. It is therefore uncertain how much fraud is actually due to fake identification, as opposed to, say, failing to divulge employment. It is also unclear how health, as opposed to welfare, fraud, and fraud by providers as compared to consumers, is going to be detected via the individual card system, and who is going to investigate this (more costs would also be incurred).

If fraud reduction is genuinely the main objective, perhaps the money would be more effectively spent on focusing on other forms of 'robbing' such as corporate fraud, rather than on targeting the poor. There is also the possibility that professional identity thieves will find it easier to defraud the system when only one card is required for proof of identity and there is a centralised database. In cases of suspected identity theft or where there are other attempts to misuse the access card, it is not clear how the legitimate owner will be able to make transactions in the interim.

HIC is also not convinced that the savings estimated by KPMG of \$3 billion over ten years will actually result. The public has been denied access to the detailed costings by KPMG, but it is known that the initial implementation of the card will cost \$1.09 billion. As the Taskforce's *Discussion Paper No 1* notes, registration for the card is likely to be a mammoth task. Further, given the vast number of outlets where the card may be used, to effectively eliminate the potential for 'double dipping' with the card and to make the system more efficient for consumers, as is claimed, will require a far more sophisticated administrative system than is currently in place in agencies like Centrelink, particularly in the smaller offices.

The Commonwealth Government also says that the card is not compulsory,⁸ but in order to receive Centrelink benefits, government hospital treatment or claim for Medicare, a card will be necessary after 2010. It is therefore difficult to imagine many Australians not 'choosing' to register for one eventually, as the 'choice' not to have a card by 2010 is a 'choice' not to participate in the Medicare system to which all taxpayers are required to contribute. Government arguments have also suggested that if there was a natural disaster or similar emergency, people might be able to access emergency payments via ATMs or EFTPOS using the card,⁹ again implying that having a card might be a practical necessity.

The fact that Clause 200 specifies that the card is not to be required to be carried at all times is therefore not convincing as a refutation of any suggestion that it is a national identity card, especially when this is coupled with the acknowledgment in the Explanatory Material that being compulsory is (only) *one* distinguishing feature of a national identity card.¹⁰

⁸ See eg *Exposure Draft Explanatory Material*, 12 December 2006, 2.12.

⁹ *Exposure Draft Explanatory Material*, 12 December 2006, 3.38

¹⁰ *Exposure Draft Explanatory Material*, 12 December 2006, 5.107.

Simply legislating (Clause 20(2)) that the card is not to be used as a national identity card under the Act is also not sufficient because of the high risk of various forms of function creep, as acknowledged by the Taskforce in its *Discussion Paper No 1*. For instance, it might become very difficult for people who choose not to have the card, even if they can afford to live without the health and other benefits; for example, mobile phone companies might decide that the card is now the standard required form of identification for obtaining a new phone contract.

These matters are especially of concern for health consumers, particularly for people whose health status is still greatly stigmatised and risks discrimination, such as consumers with mental illness or who are HIV-positive. Function creep and insecure database systems could result in this data being revealed in employment, insurance or banking settings, or in dealings with police (for instance, when being pulled over for speeding), and many other possible scenarios. Even if the specifics of the illness are not on the card, the fact that an agency is listed on the card may provide an opportunity for the unscrupulous to further investigate. Once people are ‘in the system’, there is also nothing to prevent future legislation less mindful of civil liberties from expanding the list of personnel authorised to access the data.

It is also unclear what would be put in place to stop the card having the technical capacity to contain more compulsory data in the future; such as fingerprints or retinal scans, via the argument that this is now routine in other countries (a point already used repeatedly by the Commonwealth Government to justify the proposed card system). Indeed, there is some scope for this in the proposed Bill (see the discussion of Clauses 110(1)(g), 160 and 170 below).

There must therefore be safeguards other than a simple assertion that the card system is not intended to be a national identity scheme.

Clause 30

We welcome the requirement for written and publicly available guidance in administration of the Act, but as this provision stands it is too vague (see comments on Clauses 55(1)(b) and 65(2) below for examples of more specific applications).

Clause 55(1)(b)

HIC is particularly concerned that the card may exacerbate the difficulties for consumers from disadvantaged communities. For example, unemployed, poor and low income consumers are the least likely to be able to ‘choose’ whether to register for a card, because they are the most likely to be in receipt of welfare benefits or to rely on government health services. Not registering for a card would effectively mean ‘choosing’ severe hardship.

It is also not at all clear that the card will improve the process of claiming and obtaining benefits and services, despite Government arguments to the contrary. For example, homeless or some Indigenous people may be disadvantaged by being required to put all their eggs in the basket of one card that might get lost or damaged. These groups, along with other disadvantaged consumers such as asylum seekers, who already have difficulty getting access to health and social services, may also still have problems with obtaining enough acceptable identification to register for an access card in the first place.

We therefore welcome the flexibility provision in Clause 55(1)(b), but how the Secretary might assess such situations is unspecified and so leaves too much to discretion. In the interests of public transparency and accountability, the Bill should require the tabling of a Ministerial policy statement which specifically addresses the contexts and substitute criteria used in applying Secretarial discretion, along similar lines to the framework in Clause 30.

Again though, our strong preference is for extensive consultation with vulnerable consumers in order to test any claims about the consumer benefit of the proposed card, before any legislative strategy.

We also note with concern the statement in the Taskforce's *Discussion Paper No 1* that 'it is possible that confiscation of access cards may be authorised by law in the event of their systematic or criminal misuse' (p14). The implication is that given the nature of the card system, the individuals concerned would be effectively denied access to health care. We emphasise that universal access to health care is a human right fundamental to Australia's health system, and that any move toward a punitive system similar to the 'breaching' approach used by Centrelink in relation to welfare benefits will be vigorously opposed by consumers and community organisations.

Clause 65(2)

We welcome the stance of flexibility where a person's registration date would prevent them from receiving benefits to which they would otherwise be entitled. However, in the interests of public transparency and accountability, the Bill should require the tabling of a Ministerial policy statement along similar lines to the existing requirement in Clause 30, and which specifically delineates the meaning of 'deserving and exceptional cases'.¹¹

Clause 110(1)(g)

Again a type of function creep is apparent in this provision, which anticipates demanding more personal data from a consumer before issuing them with the card. This is a significant privacy issue which would be better at least being subject to the processes of statutory amendment and parliamentary debate, rather than the secondary and less publicly accessible process of a legislative instrument. Accordingly, Clause 110(1)(g) should be deleted.

¹¹ *Exposure Draft Explanatory Material*, 12 December 2006, 4.22.

Clauses 160 and 170

As it stands, despite the claim in the Explanatory Material that Clause 170 acts to limit the information that may be stored on the Commonwealth area of the chip in the card, in reality any information that is ‘reasonably necessary’ may be required by the Secretary (Clause 160(1), Item 15(a)).

If this information is about a benefit card held by the applicant, even that criterion does not apply (Clause 160(1), Item 10). If the Minister makes a determination, the extra information need not even be reasonably necessary, but simply for the purposes of the Act (Clause 160(1), Item 15(b)).

Again this raises concerns about potential function creep. Items 10, 15 and Clause 160(2) should accordingly be deleted.

Part 3 Division 5 and Part 4 Division 1

While vesting ‘ownership’ of the card in the consumer may be empowering in some circumstances (by, for example, perhaps allowing some consumers to record health information on their part of the chip which they would like to have made accessible), it needs to be stressed that many consumers may not wish to ‘own’ such a card in the first place.

There is also a risk of function creep which is not addressed – and perhaps even sidestepped – by naming the card holder as owner of the card. This is because the issue of

ownership of the card as it raised in the Exposure Draft and the Explanatory Material glosses over other issues of ‘choice’ and ‘consent’. Simply making abuse of the card (eg by retailers demanding it as an extra form of identity) unlawful (as in Part 4 Division 2) will not on its own protect vulnerable consumers – ‘those who are most in need of assistance’ (Clause 20(1)(a)). This has already been demonstrated in other retail contexts such as unscrupulous mobile phone contracts or the risks of unregulated credit, where the existence of legal offences means little if there is no effective regulatory and monitoring system with back-up policing and enforcement.

In this regard Health Issues Centre is also particularly concerned that the Explanatory Material qualifies the meaning of Clause 210 by suggesting: ‘You may wish to present your card *in other circumstances* in order to gain concessions.’¹² The implication is that concessions will otherwise not be available, and thus the card again moves toward a default identity card in these contexts. As with Medicare and Centrelink benefits to which they are entitled, the consumer must ‘choose’ to either use the card or suffer a financial penalty. Consumers already experiencing economic and social disadvantage are the ones most likely to ‘choose’ to waive their privacy rights in these situations.

¹² *Exposure Draft Explanatory Material*, 12 December 2006, 3.47, our emphasis.

Clause 315

In the interests of public transparency and accountability, the Ministerial determination of identity guidelines should be specified in the provision as mandatory.
