

➤ **Submission to Department of Human Services on the Access Card**

12th January 2007

Kerri Hartland
Deputy Secretary
Office of Access Card
Department of Human Services
PO Box 3959
MANUKA ACT 2603

Dear Ms Hartland,

Human Services (Enhanced Service Delivery) Bill 2007

The Administrative Review Council is pleased to provide input into the access card initiative and specifically, to comment on the exposure draft of the Human Services (Enhanced Service Delivery) Bill 2007.

The Council was established by the *Administrative Appeals Tribunal Act 1975*. The Council's role is to monitor and provide advice to Government, through the Attorney-General, in relation to Commonwealth administrative review and administrative law generally. The Council is required to review and inquire into the Commonwealth administrative law system and to recommend to the Attorney-General improvements that might be made to the system. This includes assessing the adequacy of procedures used in exercising administrative discretions and reviewing classes of decisions, including new legislative proposals, to determine if they should be subject to administrative review.

The areas of particular interest for the Council relate to the administrative law values that need to be taken into account in relation to the card and its use by government departments and agencies. In this respect, we trust that the Office of the Access Card will have regard to the Council's recommendations and expertise in this area.

The Council understands that the current Bill is the first part of the legislation that sets out the broad scope of the access card regime and that there will be a further Bill, expected to be introduced in 2007. It is likely that the areas of most interest will arise in the second tranche of the legislation, however, the Council takes this opportunity to provide some preliminary comments.

General comments

The Council notes that the introduction of the Access Card will result in some clear benefits to customers including the replacement of 17 existing health and social service cards with a single card, improved privacy protection, protection against identity theft, fraud reduction and improved service delivery. The

Council is also supportive of the proposal to allow people to customise and retain personal control over certain aspects of the card and the storage of personal information in separate areas of the card's chip.

As a number of significant matters including review mechanisms and privacy issues are not dealt with in the current Exposure Draft of the Bill, the Council is keen to ensure that the legislative scheme as a whole complies with administrative law requirements. This is particularly important since the access card governance and framework will be developed in a series of legislative tranches. It is important for key administrative law considerations to remain at the forefront of the drafter's consideration.

The Council agrees with the recommendation in the Fels Consumer and Privacy Taskforce Report which states that legislation must adequately provide for administrative oversight of the access card scheme.

Administrative law

The Council recommends that the governance framework for the access card initiative accords with administrative law principles of accountability and transparency to ensure that decisions are made correctly from both a legal and a merits perspective.

This should include the maintenance of full documentary records of delegations under the legislation and comprehensive and standardised guidelines for administrative decision makers in relation to the access card regime.

Privacy

The Council supports the proposal that existing privacy protections in the *Privacy Act 1988* apply in relation to the access card and that the Bill is not intended to affect the operation of existing privacy protections.

The Council looks forward to contributing further on this issue when privacy matters are more fully considered in the development of the second tranche of legislation.

Registration

The Council is supportive of the procedures established to address exceptional situations in which the documents of an applicant are not sufficient to clearly establish identity. Recognising the need to balance identity security and fraud control with the rights of individuals accessing government benefits and services, the Council recommends that in making decisions regarding identity, the needs of disadvantaged and remotely located individuals be carefully considered and accounted for.

In this context, Council notes that under item 55, the Bill provides “You, or someone else on your behalf, may apply to the Secretary for you to be registered on the Register...” In circumstances where a person may be required to act as agent for an individual who is unable to manage their own affairs for any reason such as mental incompetence, Council recommends that the Bill clearly and expressly extends the requirement to provide accurate proof of identity to the agent or guardian of the individual.

Currently, the wording of the legislation refers to “you” and the responsibility of the agent is less clear. Council is concerned to ensure that individuals who are incompetent are not disadvantaged by the enrolment requirements for the access card register and that there is no opportunity for fraud on the part of a person, such as a family member, acting on behalf of an individual who requires the assistance of an agent or guardian.

Council notes the concerns expressed by the Fels Consumer and Privacy Taskforce about the possible requirement for a “gold standard” proof of identity and the consequences for disadvantaged or incompetent members of the community that make up a significant number of the recipients of health and social service benefits. The taskforce states that care needs to be exercised in setting identity standards that could exclude marginalised community members from receiving benefits. In this context, the Council urges the legislative drafters to consider an appropriate balance between a proof of identity standard that is too high for a disadvantaged individual to meet and one that is too low, thereby leaving the individual open to fraud by an agent or guardian.

Review procedures

The Council suggests that consideration be given to the appropriate forum for investigation and complaint handling concerning the access card. Current external regulatory bodies such as the Commonwealth Ombudsman and the Australian National Audit Office have existing frameworks, procedures and expertise and may be appropriate in this regard. It may be more appropriate and efficient for such existing bodies to assume regulatory functions rather than to seek to create a new body with consequential set up requirements and cost.

The Council considers that it will be extremely important for the next tranche of the legislation to provide for appropriate appeal rights for individuals affected by access card related administrative decisions, especially since the intention is that possession of an access card will ultimately be a mandatory requirement for obtaining government entitlements and services.

Delegations

The Council notes that Section 30 of the exposure draft of the Bill provides for the Minister to issue written policy statements in relation to administration of the Bill that will apply to all delegates and authorised persons.

The Council is concerned that in addition to setting out the Government's policy expectations to which decision makers must have regard in item 30, and the determination of identity guidelines in item 315, there is further provision for the Minister or a CEO to direct delegates/decision-makers.

The wording of items 320(3), 325(2), 330(3), 335(2) and 340(2) state that a delegate must comply with "any directions" that the Minister or Secretary gives to the person. Council recommends that if the directions are intended to refer to decision making in accordance with a written statement of the policy of the Australian Government, then this should be made clear in the drafting, either by rewording of the delegations provisions or by including a definition. Paragraph 7.19 of the Explanatory Material suggests that this is the intended outcome.

As a principle of administrative law, although a delegate will be required to act according to, and within the limits of, the instrument of delegation, a delegate acts independently and makes decisions on their own behalf, not in the name of the principal.

The Council recommends that directions given in accordance with government policy be open to some form of scrutiny for accountability purposes. A means of achieving this would be to include a provision in the legislation requiring the Minister to certify in writing a statement of policy applying to decisions made in relation to the access card. Alternatively, a statement of policy may be one approved by Cabinet and published in the *Government Gazette* where such a statement would then provide notice in advance of any application to review a decision.

The application of policy should not result in an unjust decision in the circumstances of a case. The Council refers to section 64(4) of the *Administrative Decisions Tribunal Act 1997* (NSW) in this regard and looks forward to expanding upon this issue at a later date.

The Council's publication *What Decisions Should Be Subject To Merits Review?* provides guidance on which administrative discretions should be reviewable. Council would be happy to provide further advice on this issue.

As you may know, the Council wrote to the Minister, The Hon. Joe Hockey MP on 11 October 2006 expressing a strong interest in being involved in the development of legislation prepared to implement the access card initiative. The Council would be grateful to receive pre-exposure drafts of the legislation as part of a continued involvement in the legislative development process and looks forward to the provision of further comment on the access card scheme.

The Council's acting Executive-Director is Ms Wendy Banfield who can be contacted on 02 6250 5800 if you would like to discuss the Council's submission further.

Yours sincerely

Jillian Segal AM
President