



**Briefing for House of Lords**

**Report Stage**

**Identity Cards Bill**

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**For further information contact  
Roger Smith, Director  
Email: [rsmith@justice.org.uk](mailto:rsmith@justice.org.uk) Tel: 020 7762 6412**

1. JUSTICE is an independent all party law reform and human rights organisation which seeks to advance human rights, justice and the rule of law. JUSTICE is also the British section of the International Commission of Jurists.

## Introduction

2. JUSTICE accepts that both an identity card scheme and a national identity register could be introduced in ways that are compatible with human rights considerations of privacy but have consistently maintained our scepticism of the value of this particular Bill based on three core issues:
  - (a) undue invasion of privacy;
  - (b) practicality and cost-benefit;
  - (c) compulsion.We remain concerned at the scope of the enabling legislation.
3. We recognise that most members of society now carry identification issued by private sources, such as banks, as well as a variety of identification from the state and we acknowledge the developments of biometric information and passports,<sup>1</sup> accepting the benefit of the UK being part of such a scheme.<sup>2</sup>
4. We have, however, consistently doubted the practicability and appropriateness of grand schemes for identity or entitlement cards.<sup>3</sup> In our view, better control of identity could be obtained by a series of less ambitious measures – such as tightening up existing registers of births, marriages and deaths; or maintaining better lists of lost or stolen identity documents.
5. The Identity Cards Bill is a major piece of enabling legislation, granting wide powers to the Secretary of State to make orders to determine the detail of the scheme. It is increasingly clear that ministers need this ability to decide on the scheme at a later date because too much remains uncertain at the present time. The Bill has been produced at too early a date.
6. It is important to recognise that the bill is less about identity cards than a National Identity Register. The advance of technology and the creation of a register make a physical card largely redundant. People will not be required to carry an identity card because they can be checked directly against the register. The register is an enormous undertaking, both in terms of principle and practice. There is no doubt that it will be a major invasion of individual privacy. We fear that it may deter some low-level theft of identity but encourage high-level identity construction by organised crime and sophisticated terrorist groups. The government could potentially find that it gets the worst of all worlds: the expense of an apparently foolproof system that can, in fact, be fooled.

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<sup>1</sup> The International Civil Aviation Organisation has approved the use of biometric information in passports and the United States' Enhanced Border Security and Entry Visa Reform Act 2002 requires that members of its visa waiver programme must have machine-readable passports including biometric information.

<sup>2</sup> 'British citizens will increasingly need to possess secure biometric travel documents', Home Office memorandum to Home Affairs Committee inquiry on identity cards, ID52, January 2004

<sup>3</sup> JUSTICE has previously responded to two previous Home Office Consultation papers on the topic of identity, or as previously proposed, entitlement cards, *Entitlement Cards and Identity Fraud*, Cm 5557, July 2002 and *Identity Cards: The Next Steps*, Cm 6020, November 2003 and has also published a joint paper with the Institute of Public Policy Research in 1995 entitled *Identity Cards Revisited*.

## Practical Implementation

### 7. What will the cost be?

The cost, in relation to both individuals to purchase a card and the entire cost of the scheme, is unclear, and will be vital to public acceptance of the scheme. The latest estimated cost from the Home Office for a combined passport and identity card is £93<sup>4</sup> and £30 for a standalone identity card.<sup>5</sup> We fear that the costs will, in the event, be even higher since the government can currently give no estimate based on a sufficiently scoped project. It would seem highly doubtful that a commercial business would embark on such an ambitious scheme on the information about costs and practicability currently available to the government.

8. A highly publicised report from the London School of Economics concluded that the Home Office had substantially underestimated the cost of the scheme.<sup>6</sup> The report put the median costs of the project at £14.5 billion, leading to speculation that the cards could cost as much as £300.<sup>7</sup> The Home Office has issued a rebuttal to the LSE, but significant questions remain unanswered in relation to the technological detail on the scheme, for example, the length of time that the cards will last or the type or types of biometric to be used, which are likely to have considerable impact on the overall cost of the scheme.

9. All research indicates that there is likely to be massive cost resistance from individuals when asked to pay for an identity card. A MORI poll, dated 22 April 2004 and commissioned by Detica, an IT consultancy, found 80 per cent support for identity cards. However, only 48 per cent of those polled were prepared to pay for the card. Only 20 per cent were willing to pay more than £25. The issue of cost becomes very significant when the scheme is to become one of compulsion. Public support should be considered highly volatile in relation to likely costs.

### 10. Technology

The Cabinet Office found that 'around 10-15 per cent of 'genuine' people fail biometric tests set at the highest level of corroboration'.<sup>8</sup> Accuracy rates become crucial when magnified by the intention to include the entire population in the Register. Some individuals are unable to provide eye scans or fingerprints due to legitimate health reasons, aside from the real possibility of fraudulent manipulation of biometric information. There is little information regarding which categories of people are likely to present particular difficulty in relation to biometrics; what estimate of numbers has been made; and how it is intended that the difficulties will be met and at what cost.

11. It is becoming apparent that the government's ambition has run ahead of the capacities of existing technology. Ministers should be pressed on the results of current trials. The use of multiple biometrics will undoubtedly assist in overcoming some of the practical consequences. However, these will necessarily introduce a further degree of inaccuracy because failure on one, or possibly two, biometrics is likely to be disregarded in the interests of practicality. This may be an acceptable

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<sup>4</sup> The Home Office Regulatory Impact Assessment introduced to the House of Commons on 25 May 2005 at para 22. The Assessment also states that the current best estimate is that the total average running costs for issuing passports and ID cards to UK nationals is estimated at £584m (para 19).

<sup>5</sup> 'It will be affordable to set a charge of £30 at current prices for a stand-alone ID card which is valid for 10 years', Charles Clarke, HC Debates 13 Oct 2005: column 562W

<sup>6</sup> <http://is.lse.ac.uk/IDcard/>

<sup>7</sup> See for eg 'Anger of 'sale' of ID details' *The Telegraph*, 'Rebel MPs to get price promise for poor on ID cards' *The Times*, and 'Ministers play down claims on high cost of ID card' *The Guardian*, 27 June 2005

<sup>8</sup> P61, Cabinet Office *Identity Fraud: a study* July 2002

commercial risk in terms of running a busy airport: the system would improve current security. The wider use of the card for all purposes of identity will massively increase the number of false and positive identifications.

## Human Rights

### 12. Privacy

As an invasion of privacy, the European Convention of Human Rights requires that the creation of such a register be justified as a proportionate response to meet a specific need. The European Court of Human Rights has found that neither ID cards nor a personal identity number necessarily infringe the provisions of the Convention.<sup>9</sup> However, we are not convinced that the present proposals meet the appropriate threshold in terms of the ability to address a clearly perceived and articulated need in a proportionate way.

### 13. Proportionality

ID cards seem unlikely to meet many of the alleged needs for which they are being introduced: for the purposes of national security, prevention or detection of crime, enforcement of immigration controls, enforcement of prohibitions on unauthorised working or employment and securing the efficient and effective provision of public services. Home Office admissions of 'overselling' the scheme were an interesting shift in government rhetoric.<sup>10</sup> It seems unlikely that, by reference to these objectives alone, the scheme is cost-effective or proportionate. Following the bombings in London in July 2005 the Secretary of State was cautious in stating that while cards might provide limited use overall against terrorism, they would not have prevented the attacks. It is widely quoted that the identity card scheme in Spain did not prevent the Madrid bombings, but was useful in identifying the victims. There is no evidence of reduction in crime in other countries that have an identity cards scheme. The use against illegal immigration would also be limited, given the extent to which this operates outside the existing legal framework.

14. When the bill was first introduced to Parliament in a previous session, the Joint Committee on Human Rights were heavily critical of the initial lack of any detailed explanation of the Bill's compatibility with human rights,<sup>11</sup> especially in relation to Article 8 of the European Convention on Human Rights, which guarantees the right to respect for privacy<sup>12</sup>: The Committee also expressed concern about the compatibility of the Bill with Article 14 of the ECHR, the right to non-discrimination in the protection of the Convention rights.

15. In its most recent report the Committee remain concerned:

*We maintain the view of the previous committee that the Bill's provision for the retention of extensive personal information relating to all or large sections of the population may be insufficiently targeted to be justified as proportionate to the statutory aims and may lead to disproportionate interference with Article 8 rights.<sup>13</sup>*

The Committee also remain concerned the phased-in compulsory registration risks disproportionate and discriminatory interference with Article 8 rights.

<sup>9</sup> Reyntjens v Belgium App No 16810/90; 73 D.R. 136, Lundvall v Sweden App No 10474/83; 45 D.R. 121

<sup>10</sup> See 'Labour steps back in push for ID cards' *The Guardian* 4 August 2005

<sup>11</sup> Fifth Report of Session 2004-05 and Eight Report of Session 2004-05

<sup>12</sup> Article 8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

<sup>13</sup> First Report of Session 2005-06 page 20 para 4.11

16. **Civil or criminal offences?**

The Bill introduces a variety of new civil offences. The imposition of civil penalties may not create ‘criminal martyrs’, stated by David Blunkett, when Home Secretary, as the reason for the terminology being used. The Secretary of State imposes the penalty upon an individual by way of a notice (Clause 33) and also will assess an appeal against an initial objection to the civil penalty (Clause 34). There is also then provision for the penalty to be appealed to court (Clause 35) where the penalty may be cancelled, reduced or the appeal dismissed. Whatever the language, these provisions are coercive and, in essence and probably law, criminal. This is also the view of the Joint Committee on Human Rights:

*...given the levels of potential penalties and their punitive and deterrent purpose, there is a risk that the civil penalties under the Bill would be seen as criminal in nature and therefore attracting the protection of Article 6.2 and Article 6.3<sup>14</sup>*

To ensure compliance with the ECHR it would be desirable for full due process guarantees to constitute part of the Bill.

### **Political Acceptability**

17. **Constitutional change?**

As stated by the House of Lords Select Committee on the Constitution, the introduction of an identity card scheme adjusts the relationship between an individual and the state.<sup>15</sup> This makes it vital that there is a strong legal basis and adequate safeguards:

*all the more important when the scheme envisaged will record in a single database more information about the lives and characteristics of the entire adult population than has even been considered necessary or attempted previously in the United Kingdom, or indeed in any other Western country.<sup>16</sup>*

It is often stated that there has been no successful introduction of an identity card scheme in a common law country. It is also stated that identity card schemes do exist in most other European countries. However, it is vital to recognise that the scheme proposed under the current bill is far more wide-ranging and ambitious than any other European scheme.

18. **Satisfactory oversight**

It is essential that such a major scheme needs independent oversight. We welcome the introduction of a National Identity Scheme Commissioner (Clauses 24-26) and acknowledge that slight changes were made to the Commissioner’s function under Clause 24 when the Bill was re-introduced in this session. However we strongly urge that the powers of investigation and reporting should be greater than those granted under the Bill. In particular the Commissioner must have the power to report direct to Parliament, not initially to the Secretary of State who must not be able to exclude matters from the report as currently proposed. The Commissioner must be, and be seen to be, independent. Clause 24(3) should allow the Commissioner to review the whole scheme and clause 25 should allow the Commissioner to lay a report annual to both Houses of Parliament. This

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<sup>14</sup> Ibid at page 26 para 4.29

<sup>15</sup> Third Report of Session 2005-06 para 2

<sup>16</sup> Ibid

is the same power granted to the Information Commissioner under s52 Data Protection Act 1998.

19. **Incremental introduction**

The current Bill would be largely unnecessary if a more incremental approach was taken to reform. A difficulty with the Bill is that Parliament will be approving the introduction of a mandatory card - at what would appear to be a highly unpopular charge – which will apparently only be implemented at the earliest in 2014. This should be acknowledged by the full parliamentary legislative process, not simply a debate and vote in both Houses. Parliament needs to ratify such proposals only after the most intense scrutiny and only at the time when the public will feel that they are directly involved in the decision. A vote now in relation to reforms to be implemented in a decade's time creates too distant an accountability to the electorate. An incremental approach would limit the need for the Bill to grant the Secretary of State such wide enabling powers. The scope of many of the powers conferred on the Secretary of State have been criticised by the House of Lords Delegated Powers and Regulatory Reform Committee.<sup>17</sup>

20. It is reasonable that passports be supported by a database. This can, however, be separate from other government databases. It does not need to be part of National Identity Register as proposed in the Bill. Indeed, an alternative approach would be an incremental approach to linking discrete databases. The first stage would be a series of much less ambitious reforms designed to provide greater checks on the identity of those applying for passports and the introduction of biometric identifiers; the second state would be the introduction of a voluntary card and the final stage, if thought appropriate, would be the introduction of primary legislation linking the databases and a mandatory card.

**Conclusion**

21. Accordingly, we regard the Bill as flawed. It is over-ambitious. We would urge considerably more caution on the government; and advise a vote against the Bill in its current form.

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<sup>17</sup> Fifth Report of Session 2005-06