Identity Cards Bill 2005

Briefing Notes

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Preamble

About No2ID

1 NO2ID is a diverse group of people and organisations, politically of all parties and none, who stand against the government's attempts to introduce intrusive, expensive and ineffective control of personal identity.

2 We believe that government proposals to create a national identity scheme — that includes an ID card — would fundamentally change the nature of the relationship between citizen and state. We believe that government is the servant of its citizens; citizens should not have to exist by permission of the government.

3 We are opposed to legislation that will require every citizen to report changes of address to government on pain of imprisonment or any other imposed sanction — including recurring and/or persistent fines. We believe that it is our fundamental right to assert who we are, without being checked against an approved list.

4 We believe that there is no case for a central identity database containing everyone's personal information that can be accessed by all branches of government, and that any such database would represent a gross invasion of privacy.

General

5 In these briefing notes, we have tried to avoid repeating comments made by Liberty in their analysis of the Identity Cards Bill, except where we believe emphasizing these points is particularly important. Liberty's analysis paper can be found from their website at http://www.liberty-human-rights.org.uk/privacy/id-card-bill-key-points.PDF and was written by Dr Caoilfhionn Gallagher and Gareth Crossman.

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Key points

7 The bill contains dozens of substantial new powers for the Home Secretary, including powers to alter almost every detail of how the scheme operates, most of which with only cursory Parliamentary oversight

8 The bill rewrites the Constitution, creating a flawed "superaffirmative" process for approving secondary legislation, merely in order to avoid the political problem of introducing compulsion through new primary legislation.

9 The moves to compulsion may be as arbitrary and discriminatory as the Home Secretary sees fit, introducing onerous penalties to those who have been compelled.

10 The bill leaves most of the detail of the operation of the National Identity Register and the ID cards scheme to secondary legislation — we contest that Enabling Acts are dangerous.

11 The Parliamentary schedule for this bill is being rushed — and not only by the Prime Minister's desire to hold a General Election within the next six months. Without fail, rushed legislation means flawed legislation.

12 We do not believe that the scheme has been accurately costed; this bill effectively presents a blank cheque of taxpayers' money to the Home Office.

13 The bill provides minimal oversight for the scheme — less even than the Draft Bill did.

14 The bill introduces an obviously-faulty presumption of accuracy for the data in government databases.

15 Whether compelled or not, the bill makes maintenance of one's record on the National Identity Register both onerous and expensive — and all polling data shows that the popularity of the scheme drops away when the costs are considered.

16 The bill codifies massive, broad data-sharing across government departments.

17 The bill introduces several new crimes, including some with no requirement to prove *mens rea* and some that may not even be deliberate.

More detailed analysis

New powers for the Home Secretary

18 The Home Secretary is creating for himself 31 new powers, not including the seven new fines he may levy or the eight new crimes created. Of these new powers, nearly two-thirds have minimal oversight, even by the somewhat more lax standards of secondary legislation.

19 Importantly, many of these new powers directly affect the few safeguards provided over the scheme — which "registrable facts" may be listed on the National Identity Register, for example.

20 Without affirmative Parliamentary oversight, the Home Secretary may cancel or require surrender of an identity card, without a right of appeal, under clauses 13(1) and 13(2).

21 Without affirmative Parliamentary oversight, the Home Secretary may provide information to numerous organs of state, without the consent of the individual, under clauses 19(1) and 20(1). That same power extends to information being provided to just about any "person" — including corporate persons and foreign governments — under clause 22(1) with only the requirement of an affirmative resolution of each House. It doesn't seem overly paranoid to imagine selected data being sold for marketing purposes (as happened with the Electoral Roll), in the inevitable event of the scheme running over budget.

22 The Home Secretary can impose a requirement, under clause 5(4), for applicants to attend at any specified place and time in order to have yet-to-be-determined biometric data sampled and "otherwise to provide such information as may be required by the Secretary of State", with no requirement that the time and place — or the other such information — be reasonable, for example.

23 Clause 3(5) allows the Secretary of State arbitrarily to amend — again, with only secondary legislation — the details stored in the database, including which (currently just the "audit trail") gain the extra protections in clause 19. Such changes should happen by amendment to primary legislation, where proper parliamentary scrutiny and debate can occur.

Introduction of compulsion

24 More problematic, though, are the clause 6 powers to introduce compulsion. Once compelled to acquire a card, individuals are treated far less leniently in a whole raft of occasions.

25 Once an individual has been compelled to get a card, under threat of repeated £2500 fines for each occasion where the Home Secretary notified the individual of their compulsion, £1000 fines may be levied for forgetting to renew their card (see clause 9), or for forgetting to jump through hoops set by the Home Secretary in clause 5(4).

26 Similarly, once an individual has been compelled to get a card, the protections against unlawfully requiring the presentation of an ID card no longer apply — even for private services, as specified in clause 18(2)(c), let alone the public services in clause 15(2).

27 Even ignoring the way in which individuals are treated after having been compelled to acquire an ID card, the nature of clause 6 Orders is going to be discriminatory. There is nothing on the face of the Bill to prevent clause 6 being used discriminatorily — and doubtless exposing the government open to the danger of litigation under the Human Rights Act and in the European Court of Human Rights in Strasbourg.

28 Many of the problems with the introduction of compulsion, however, are to do with the Parliamentary process. The Home Office is evidently aware of the politically controversial nature of compulsory ID cards and, in an attempt to avoid the hassle of securing two pieces of primary legislation, has invented a wholly-new means of approving legislation, spelled out in clause 7.

29 This "superaffirmative resolution" process, however, is badly flawed. Not only does the process provide less oversight, exposure and opportunity for debate than new primary legislation, but the superaffirmative process also fails to provide any means for amending a resolution; it's all or nothing.

30 Secondary legislation is never treated with the level of attention commensurate with that of primary legislation; when Orders have been presented, in the past, that have caused controversy about civil liberties, failure to secure an amendment to negate a crucial point has rarely been followed by the whole Order falling. As these clause 6 Orders cannot even be amended, it seems impossible to believe that an Order will fall in order to prevent a controversial part of it.

Enabling legislation and emergency legislation

31 Since before the Enabling Act of March 1933, it has been well known that moving too many powers to one place is a bad idea. By the same measure, some of the worst legislation to make it through the Palace of Westminster has been hurried through.

32 One only need look at the Defence of the Realm Acts, the Prevention of Terrorism (Temporary Provisions) Acts, the Dangerous Dogs Act 1991 and the Video Recordings Act 1984 — let alone the controversy surrounding provisions in the Anti-Terrorism, Crime and Security Act 2001 or in the American equivalent, the "Patriot Act" — to see that proper scrutiny makes better laws.

33 It is hardly surprising, of course, that legislation passed with minimal debate and little attention to the details tends to be viewed, in hindsight, as both controversial and ineffective and tends to lead to miscarriages of justice.

34 It would make more sense for the Bill to wait until after the anticipated election in May. This would allow Parliament to consider this Bill in greater depth and to concentrate on more important — and less controversial — issues that will benefit the population at large, for example promised charities legislation and long-awaited Constitutional Reform.

Presenting a blank cheque to the Home Office

35 The proposed costings for the identity cards scheme are still the subject of much debate. Whilst the Home Office has tried to maintain the original claims made in the Entitlement Cards consultation — that the scheme would cost between £1.3 bn and £3.1 bn — it seems clear that these estimates are optimistic at best.

36 Independent analyses and all the evidence from schemes abroad have suggested a price tag several times higher than this, if not an order of magnitude more. Furthermore, the scheme is intended to be funded from the fees and fines levied in its management. This seems to ignore all the evidence from opinion polls, which show that support for an ID cards scheme in the UK drops away completely once individuals realise the potential cost of the scheme; even the most recent data, the ICM poll commissioned by Reform, with telephone polling on December first and second, 2004, the overwhelming majority of individuals are unwilling to pay more than even £10 for an ID card, despite the initial figure showing over 80% support for the principle of their introduction.

37 The cloak of commercial confidentiality maintained by the Home Office makes public debate very difficult. The full cost of the scheme has not yet been detailed, despite this having been much criticised during consultation. Until such a figure has been made public — preferably before lucrative contracts have been signed — the figures remain a mystery to all but those involved within Queen Anne's Gate

Minimal oversight

38 One of the details which most astounded observers, when the Identity Cards Bill 2005 was published, was that the level of oversight — much criticised in the Draft Bill — was weakened even further in the actual Bill introduced to Parliament.

39 The Bill establishes, in clause 24, a National Identity Scheme Commissioner, who will report not to Parliament but to the Home Secretary. Whilst the Home Secretary must lay copies of the Commissioner's annual reports before Parliament, he has ensured that clause 25(4) provides him with broad powers to edit these reports beforehand.

40 Compare the establishment and responsibilities of the National Identity Scheme Commissioner, under the Identity Cards Bill 2005, to that of the Information Commissioner, under the Data Protection Act 1998:

> 6(1) The office originally established by section 3(1)(a) of the Data Protection Act 1984 as the office of Data Protection Registrar shall continue to exist for the purposes of this Act but shall be known as the office of Data Protection Commissioner; and in this Act the Data Protection Commissioner is referred to as "the Commissioner".
>
> 6(2) The Commissioner shall be appointed by Her Majesty by Letters Patent.
>
> 51(1) It shall be the duty of the Commissioner to promote the following of good practice by data controllers and, in particular, so to perform his functions under this Act as to promote the observance of the requirements of this Act by data controllers.
>
> 51(3) Where—
>
> (a) the Secretary of State so directs by order, or
>
> (b) the Commissioner considers it appropriate to do so,
>
> the Commissioner shall, after such consultation with trade associations, data subjects or persons representing data subjects as appears to him to be appropriate, prepare and disseminate to such persons as he considers appropriate codes of practice for guidance as to good practice.
>
> 52(1) The Commissioner shall lay annually before each House of Parliament a general report on the exercise of his functions under this Act.
>
> 52(2) The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit.
>
> 52(3) The Commissioner shall lay before each House of Parliament any code of practice prepared under section 51(3) for complying with a direction of the Secretary of State, unless the code is included in any report laid under subsection (1) or (2).

41 Even without these powers of redaction, clause 24(3) restricts the matters that the Commissioner may keep under review, not least to remove from his purview just about every aspect that needs strong oversight — the use of Statutory Instruments, the imposition of civil penalties, any criminal offences under the Bill and the operation of the oversight clauses themselves.

42 In addition to these restrictions, the oversight of any provision of information to the intelligence services is automatically passed, by clause 26, to the Intelligence Services Commissioner, established under the Regulation of Investigatory Powers Act 2000. Whilst his reports are at least made to the Prime Minister, rather than the Home Secretary, they are, yet again, redacted in advance of being laid before Parliament, such that the oversight they might provide can be minimal, at best.

43 We consider it quite inappropriate that the National Identity Scheme Commissioner's powers should be so tightly limited; even more inappropriate are the broad-ranging powers of redaction awarded to the Home Secretary. Given that the only bodies likely to be named as Designated Documents Authorities are public authorities, any criticism of the scheme's operation is arguably going to be "prejudicial to the continued discharge of the functions of [a] public authority"; those few comments that are not are likely to be "otherwise contrary to the public interest" or "prejudicial to national security".

44 It seems to us that the Home Secretary has set up a situation where he doesn't even need to reach for Public Interest Immunity certificates in order to cover up any controversy or scandal in agencies of his department.

45 That the Attorney General's opinion on the Bill is unlikely to be made public gives us cause for concern. If the papers are considered too damaging for the Joint Committee on Human Rights, we dread to think exactly how dangerous to civil liberties and Human Rights the Bill is. This highlights our case that the Secretary of State must not be able to exercise editorial control over any part of the Commissioner's report—particularly with governments so concerned about presentation.

Presumption of accuracy

46 As if the dangers of a large National Identity Register were not enough, clause 3(3) introduces a presumption of accuracy in that Register, meaning that any consequences of inevitable errors in the database will be left with the individual, who will have no opportunity for redress.

47 This problem is compounded by the power granted to the Home Secretary by clause 21, which allows the Secretary of State to 'correct' information "where it appears to [him] that the information was inaccurate or incomplete". On the surface of it, this might seem a sensible provision, except that there is no requirement that the Home Secretary verify that what appears to him is actually the case; it is inevitable, in a database of 75 million individuals, that this power will introduce greater inaccuracy to the dataset.

48 It is, of course, nonsense, to presume that data already held by organs of state are accurate. We already know, for example, that well over a third more National Insurance numbers exist than there are people entitled to them. Many people are already quite accustomed to having their names spelt differently by different parts of the Civil Service. Allowing the incorporation of these data is a recipe for confusion.

Maintenance of an individual's record

49 Maintaining one's record on the National Identity Register is made both onerous and expensive. Any change in personal circumstances, such as moving house, requires notification to the Home Secretary and a concomitant fee to be paid. To make matters even worse, should a card be issued with an error, such as a misspelling of the name, the individual has to pay such a fee for mistakes made by civil servants!

50 Similarly, if the Home Secretary cancels an individual's ID card, for any of the range of reasons laid out in clause 13(2), or requires the holder to surrender it, under clause 13(4), then the acquisition of a new card will cost the payment of another fee.

51 It is important that the data about an individual be owned by that individual and not by the State. Equally, individuals should maintain control over their own records, including the ability to view, all aspects of their own records — including the audit trail — without additional charge.

52 To ensure the accuracy of records, subject access disclosure (similar to under the Data Protection Acts) ought to be encouraged and occur regularly, without additional charge. The Bill makes such no provisions to ensure that individuals have an opportunity to check their records are reliable, accurate and up-to-date.

53 Whilst even 'average' individuals are likely to find maintaining their record to be somewhat onerous, these problems are compounded for anyone whose circumstances are a little out of the ordinary. Even just informing the Secretary of State of changes of address — and having to pay for the privilege — is likely to cause serious problems for the homeless, or any of the 40% of London's population who move every year. How can someone fleeing domestic abuse be expected to notify the state every time they move, let alone trust that the information won't make its way to the abuser?

Data-sharing provisions

54 We are particularly concerned with the breadth of the data-sharing provisions. Clause 19 lists a large number of bodies who may be provided with information without the subject's consent, even before one considers that clauses 20 to 23 allow even wider information-sharing.

55 Data may, in the first instance, be shared with:

- *Security Service (MI5);*
- *Secret Intelligence Service (MI6);*
- *Government Communications Headquarters (GCHQ);*
- *Serious Organised Crime Agency (SOCA);*
- *National Criminal Intelligence Service (NCIS; until the establishment of SOCA);*
- *National Crime Squad (until the establishment of SOCA);*
- Any police force (including extraordinary constabularies such as the MoD Police and the Civil Nuclear Constabulary);
- Inland Revenue;
- HM Customs and Excise;
- Any government department (in England, Wales, Scotland or Northern Ireland);
- Any Designated Documents Authority.

56 More disturbingly, however, clause 19(2) grants the intelligence services (italicised in the list above) access to the "audit trail" — and clause 20(4) extends that access to anyone in the list for "purposes connected with the prevention or detection of serious crime", as defined in clause 81(2) and (3) of the Regulation of Investigatory Powers Act 2000.

57 This "audit trail" provides a massive amount of information about an individual. If it is the government's intention that ID cards should become so popular that they are used in many everyday transactions, then this audit trail will allow someone to reconstruct a lot of information about an individual, with very little oversight.

58 Britain is already the most highly surveiled nation on the planet; providing access to this audit trail will allow organs of state not only to know when someone has interacted with the police, but also when they visited their GP, or went to the local genito-urinary clinic — possibly even when they went to the supermarket, if an ID card was used to guarantee the credit card transaction.

59 It should also be noted that all the powers in the Bill refer to providing information without any requirement that such information be provided piecemeal. Nothing on the face of the Bill would seem to prevent direct access to parts of the National Identity Register. There seems to be little protection from law enforcement and intelligence agencies performing "fishing expeditions". Combining this with the clause 22(1) powers means that such direct access might not even be restricted to domestic agencies but, in time, could stretch to European agencies or providing a new level to the Special Relationship, for example.

New crimes

60 Several new crimes are introduced by the Bill, many of which do not require the establishment of *mens rea*. Several of these are particularly concerning; especially those established by clauses 27(5) and 29(1).

61 Clause 27(5) appears to be a version of the offences under 27(1) and 27(3) — possession of a false identity document, of an identity document under false auspices or of equipment to create forgeries — designed to make it easier to convict without proving *mens rea*.

62 The intention of clause 29(1) appears to be to prevent civil servants abusing their positions and selling or otherwise leaking information form the National Identity Register. We find it most disconcerting, however, that it would seem also to prevent whistleblowing by anyone working on any part of the ID cards scheme that discovers any kind of malfeasance.