

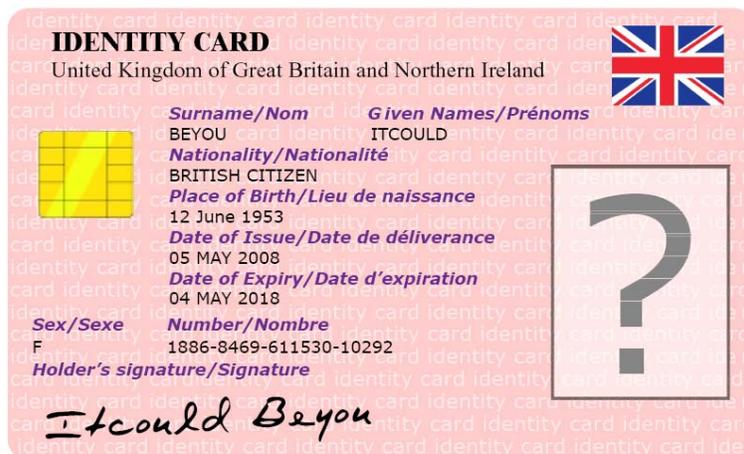


NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## More than just a card

### Intrusion, exclusion and suspect communities: implications in Northern Ireland of the British National Identity Scheme

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A briefing paper to the roundtable seminar on  
*Identity Cards and Suspect Communities*  
Malone House, Belfast, 15 October 2008

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## Introduction: The position of the Northern Ireland Human Rights Commission

- i. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. The Commission is a national human rights institution (NHRI) and is accredited with 'A' status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights, advising on legislative and other measures which ought to be taken to protect human rights, advising on whether a Bill is compatible with human rights and promoting understanding and awareness of the importance of human rights in Northern Ireland.
- ii. The Commission opposes the specific National Identity Register Identity Card scheme set out in the *Identity Cards Act 2006* and relevant sections of the *UK Borders Act 2007*, and wishes to see it withdrawn.<sup>1</sup>
- iii. It is the Commission's position that the scheme unduly infringes on the right to privacy and while privacy is not an absolute right, the Commission feels the range of justifications set out for the scheme do not stand up to scrutiny, will be counter productive and/or are disproportionate.
- iv. Further, it is the Commission's view that the impacts of the National Identity Register system will be discriminatory, particularly for Irish citizens in Northern Ireland and minority ethnic groups, in particular, Muslims and migrants.<sup>2</sup> An implementation mechanism of the scheme also specifically impacts on the freedom of movement of British citizens.
- v. The Commission's response is informed by international standards. This includes the European Convention on Human Rights (ECHR), specifically, the right to respect for privacy and family life under Article 8 (1) and the limitation clause of Article 8 (2), at times read alongside Article 14 on the prohibition of discrimination. Other international standards, to which the UK is a party, have also informed our position, including the International Covenant on

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<sup>1</sup> While recognising that many more limited identity card schemes do raise human rights issues, the Commission does not oppose identity card schemes *per se*. There is no international standard to this regard.

<sup>2</sup> In addition to commenting on legislation the Commission has completed detailed submissions to government consultations on the *National Identity Scheme Delivery Plan 2008* and the *Code of Practice: Compulsory ID Cards for Foreign Nationals*; both documents can be accessed on the Commission's website, <http://www.nihrc.org>.

Economic, Social and Cultural Rights (Articles 7, 9, 11 (1) and 12 (2)), the International Covenant on Civil and Political Rights (Article 12 (2)) and other instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination and the Council of Europe's Framework Convention on National Minorities.

- vi. Without prejudice to general opposition to the scheme, the Commission also seeks to highlight the impacts of specific measures that are part of the scheme and have been identified as detrimental to human rights.

## Human rights and identity card schemes

### Human rights standards and identity cards

1. Many countries have identity card schemes and while they are not unproblematic, there are no human rights standards in the ECHR or other core instruments against identity cards *per se*.
2. However, the British National Identity Scheme is not just a simple identity card scheme and it is the linked collection and disclosure of information through the National Identity Register that infringes on the right to privacy. It is the Commission's view that the specific scheme does engage a range of domestic, regional and international human rights standards to which the UK is a party. The UK Parliamentary Joint Committee on Human Rights concluded:

The difficulties of human rights compliance in [the Identity Cards Bill] relate not to the issue of ID cards, either on a voluntary or a compulsory basis, but to the related provision for the gathering, storage and in particular the disclosure of personal information as part of the National Identity Register to be established under the Bill.<sup>3</sup>

### *Human rights and the right to privacy*

3. It has long been a principle of democratic states that there are strict limitations on what information they can compel the individual to hand over, under what circumstances, who is allowed access to it, and who (and under what circumstances) such information can be disclosed to. Indeed, the right to privacy (subject to limitations) is referenced in the Universal Declaration of Human Rights (UDHR) and also covered by the European Convention on Human Rights (ECHR). Human rights standards have long moved beyond the cliché that if you have “nothing to hide you have nothing to fear”. Such an assertion involves the assumption that no state employee (or increasingly their private contractors) could, or would ever, misuse or abuse power, not to mention the problems of accidental disclosure of information.
4. The right to respect for privacy and family life is protected under Article 8 ECHR. The European Court of Human Rights (ECtHR) has held that the right is engaged though the gathering, storage, or disclosure of personal information and that ‘personal information’

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<sup>3</sup> Joint Committee on Human Rights, *Fourth Progress Report on Identity Cards Bill* (Eighth Report of Session 2004-05), TSO, London, March 2005.

includes information establishing personal identity<sup>4</sup>. The text of Article 8 (1) is:

Everyone has the right to respect for his private and family life, his home and his correspondence.

5. The right is not absolute and the qualifications to the right to privacy are set out in Article 8 (2), which circumscribes the rights contained in Article 8 (1). Interference in the right is only permitted when clearly proscribed by law and in pursuance of the legitimate aims listed under Article 8 (2). This, itself, must be necessary and proportionate in pursuance of this aim, and serve a pressing social need. The text of Article 8 (2) is:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

6. Article 14 ECHR deals with the prohibition of discrimination in relation to Convention rights and can be read alongside Article 8. Therefore, measures that unduly discriminate in relation to the right to private life may be in breach of this standard. The text of Article 14 is:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

## **Other identity Card schemes**

### *Previous identity card schemes in the UK*

7. There have been ID Cards and a register in the UK before. A limited system containing seven basic pieces of information was introduced in 1939 to deal with the emergencies of population dislocation and wartime rationing (under the *National Registration Act 1939*<sup>5</sup>). The system remained in place until a landmark civil liberties ruling in 1952, which struck it down on the grounds that it was being abused by police obliging individuals to produce ID cards for purposes that were far from those originally intended.<sup>6</sup>

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<sup>4</sup> *Leander v Sweden* (1987) 9 EHRR 433; and *Anann v Switzerland* (2000) 30 EHRR 843, along with *Rotaru v Romania* (2000) 8 BHRC 43 respectively; in Joint Committee on Human Rights, *Scrutiny: Fourth Progress Report on Identity Cards Bill* (Eighth Report of Session 2004-05), TSO, London, March 2005.

<sup>5</sup> There was a system of ration cards during World War I.

<sup>6</sup> Lord Goddard, *Willcock v Muckle*, 26 June 1951

8. Britain used ID Cards within its colonial empire. With parallels to the current two-tier system outlined later in this paper, this included a scheme for specific categories of migrant, delineating entitlements. Notoriously, the *Asiatic Law Amendment Ordinance* of 1906 involved a biometric registration and the carrying of passes by Indian and Chinese persons.<sup>7</sup>

#### *Existing official identity cards in Northern Ireland*

9. Northern Ireland already has a number of government-approved photographic identity cards. This includes Northern Ireland driving licences (which have been generally used as photographic ID for some time) but, more broadly available, there is the Northern Ireland Electoral Identity Card. This is available to all adults eligible for inclusion on the electoral register.<sup>8</sup> Issued by the Electoral Office for Northern Ireland, it is a free and secure photographic ID card requiring only six pieces of information.<sup>9</sup>

#### *Identity card schemes internationally*

10. Many countries have ID cards, including a number of other Council of Europe member states. Cards in these countries have not been unproblematic. Issues include the circumstances of their introduction, which in a number of European states has been a product of war, occupation or dictatorship that the existence of the ID card systems has outlived.<sup>10</sup>
11. While the circumstances and objectives whereby some schemes were developed are no longer present, there are contemporary problems. A primary concern is the potential for exacerbating racial

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<sup>7</sup> This was opposed by a movement involving Gandhi. The measures were reintroduced as the *Pass Law Act* in 1907 - the Pass Laws system continued under the subsequent white minority rule regime in South Africa and was the subject of the demonstration in Sharpeville on 21 March 1960, where 69 Black demonstrators were massacred by police. This date is now officially marked in the international human rights calendar as UN designated International Day for Elimination of Racial Discrimination.

<sup>8</sup> Namely most adults who are British, Irish, other EU and Commonwealth Citizens. Migrants and visitors not eligible for the electoral register have passports, or national identity cards issued by other states.

<sup>9</sup> Namely: surname, full forenames, full address, date of birth, National Insurance Number and signature. Source: Electoral Office for Northern Ireland [Online] available at: <http://www.eoni.org.uk/index/faqs/electoral-identity-card-faqs.htm> [13 August 2008].

<sup>10</sup> For example, the Vichy regime introduced a national ID card in 1940; the ID card remains, although it is now non-compulsory. Greece also introduced identity cards during World War II and identity cards were introduced in Spain under fascism through decree in 1944, with General Franco himself obtaining number 1. EEA states without an ID card include Denmark, Ireland and Norway.

discrimination. The London-based Institute of Race Relations makes the following observations on the European experience:

The experience of other European countries suggests the dangers that may lie ahead. In France, during the mid-1990s, the government introduced a new law which led to a massive increase in police asking people for their identity papers. In some areas, young people of Algerian or Moroccan descent complained that they were asked to produce their papers several times a week. When they refused or could not produce them, they faced immediate arrest and detention. In Belgium, Black and Minority Ethnic people had similar experiences. The case of Bicha Monkokole Kasembele, for example, became a *cause celebre* after she was stopped at a station in Brussels by the police. A Belgian citizen of African origin, she was told to produce her ID card, which she did. But the police decided that she must be an 'illegal' carrying a fake document. She was arrested and taken to a detention centre where she was held for three days and served with a deportation order to a country she had never before seen. It was only at the last minute that lawyers were able to intervene.<sup>11</sup>

The above concerns are outlined in the context that the ID card schemes are not as extensive as that being established in the UK. The Commission and international bodies, such as the UN and Council of Europe, have raised concerns regarding disproportionate or discriminatory practices in the existing use of stop and search powers in the UK – a problem that, given the above experiences, could be exacerbated by the introduction of ID cards.

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<sup>11</sup> Kundnani A, *ID Cards: Implications for Black, Minority Ethnic Migrant and Refugee Communities*, 26 May 2005 (London: Institute of Race Relations).

## Overview: British National Identity Scheme

The [Identity Cards] Bill's title is therefore misleading, and it might more accurately be described as the *National Identity Register and Identity Cards Bill*. When the scheme is fully in place, the role of identity cards themselves will be secondary to the database of information recording the personal history on a life-long basis of every individual in the Register. ... the Bill seeks to create an extensive scheme for enabling more information about the lives and characteristics of the entire adult population to be recorded in a single database than has ever been considered necessary or attempted previously in the United Kingdom, or indeed in other western countries.<sup>12</sup>

12. The British National Identity Scheme (NIS) is much broader than the issue of an ID card. The proposals see the ID card as a pointer to entry of details on a National Identity Register (NIR). The NIR is a large scale identity management system.

### Details of the British National Identity Register

#### *The registrable facts*

13. Over fifty registrable facts are set out in Schedule 1 of the legislation. As well as personal data, this includes information about other numbers allocated to the individual for identification purposes and the documents they relate to. It also incorporates biometric data with photographs, signature and fingerprints specified in Schedule 1. However, unspecified "other biometric data" can also be added. Furthermore, administrative data will be permanently recorded about each occasion the card is swiped.
14. Thanks to an amendment to the original Bill, the data that can be stored does not include 'sensitive personal data' as defined by the *Data Protection Act 1998*<sup>13</sup>. While the NIR will not contain medical, tax and benefits information, the personal identification numbers held on the NIR will act as an index to link to such information for those who have access to it.

#### *Disclosure of registrable facts*

15. The concerns regarding privacy are exacerbated by the range of agencies which will have access to the data, or part of it. This will

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<sup>12</sup> House of Lords (Second Chamber of the UK Parliament) Select Committee on the Constitution: *Report with Evidence Identity Cards Bill* (paragraphs 4 & 6).

<sup>13</sup> Namely: racial or ethnic origin, political opinions, religious belief or other beliefs of a similar nature, Trade Union membership, physical or mental health or condition, sexual life, commission or alleged commission of any offence or proceedings or the sentence of any court for the same.

include a range of government agencies and, in all likelihood, private sector companies subcontracted to manage the information.<sup>14</sup> There is also a real possibility of information which is held on the NIR being shared with the security agencies of foreign governments, including those with poor human rights records.<sup>15</sup>

### *Information surveillance*

...it is one thing to collect basic identity information – name, address, date of birth and so on; but if one is going to record details of every time that card is used or every time that card is passed through a reader of some sort, one then begins to build up a very detailed picture of the daily lives of citizens ... That does go to the heart of the relationship between state and citizens.<sup>16</sup>

16. There is the danger of a surveillance element to the scheme. The NIR will contain a record of administrative information “about occasions on which information recorded about him [/her] in the Register has been provided to any person”.<sup>17</sup> This means that whenever a public sector or private sector organisation passes the card through a card-reader, details of the request will be logged. Therefore, effectively once the ID card is swiped to verify identity for a credit card transaction, at a clinic or elsewhere, the information will be recorded permanently on the database. The use of the card will be logged along with “other particulars” in relation to each such use. The gathering of personal information in this way leaves open the possibility of tracking individual movements and a detailed profile of card holders being built up over time.
17. The House of Commons Home Affairs Select Committee in its report, *A Surveillance Society?*, expressed concerns about the potential for “function creep” in terms of the surveillance nature of the NIS, and requested an explicit statement that the administrative information will not be used as a “matter of routine” to monitor the activities of

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<sup>14</sup> There is also ambiguity regarding the disclosure of information to third parties as part of information verification. The NIS Delivery Plan 2008 states: “We want to reduce the volume of paper applications to help make applying easier for people. In some instances we may do this by electronically checking information you have provided for us with information held by other public and private bodies” [paragraph 49].

<sup>15</sup> There are initiatives at EU level including an EU-US High Level Contact Group on information sharing and privacy and personal data protection. The US has reportedly requested access to information on EU member state databases. There is the potential for information to be disseminated to US agencies, and in some circumstances, to third countries; see *Daily Mail Online* 5 July 2008 also see ‘FBI want access to British Identity Data’ the *Guardian*, 15 January 2008.

<sup>16</sup> UK Information Commissioner quoted in paragraph 43, Joint Committee on Human Rights 14<sup>th</sup> report of session 2007-8

<sup>17</sup> Section 1 subsection (5)(i) Identity Cards Act 2006

individuals.<sup>18</sup> The Government's response to that report argues that, while in a criminal investigation such data could be accessed retrospectively, such monitoring would be technically difficult partly due to technical separation, but also to the information being insufficient to monitor activities as most identity checks will not be against the NIR.<sup>19</sup>

18. However, there are discrepancies between these assurances and the information provided on the Home Office website, which indicates that:

...your identity can be checked and confirmed, not by means of the ID card alone but by using the identity verification service to check your ID card against your record on the NIR.

It is anticipated that this will be the case for "all kinds of businesses and organisations, public services and government departments". As well as the example of GP registration for public services, a lengthy list of the type of private organisations expected to use the scheme is provided.<sup>20</sup>

### *Profiling*

19. In addition to the potential of building profiles of individual activity, there is also the danger that mass information databases can be used for 'profiling'. Profiling involves individual information being trawled for particular characteristics. It is clearly not an exact science and can stigmatise individuals as well as develop 'suspect communities', by treating people who fit particular profiles as suspects. The Law Society of England and Wales has argued:

Profiling in order to identify possible criminal activity is objectionable to the extent that it makes everyone a suspect. It is dangerous in its reliance on potentially inaccurate or out-of-context data and its use of approvable algorithms. It tends towards a reversal of the normal burden of proof in both civil and criminal law.<sup>21</sup>

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<sup>18</sup> House of Commons (First chamber of the UK Parliament) *Home Affairs Select Committee, Fifth Report of Session 2007-08*.

<sup>19</sup> *The Government's Reply to the Fifth Report from the Home Affairs Committee Session 2007-08*, HC 58 July 2008.

<sup>20</sup> This includes: banks, building societies, post office & other delivery/courier services, libraries, video/DVD rental stores, phone companies, travel agents & airlines; universities and colleges, retailers (including internet retailers) property and vehicle rental companies. An example is given of a courier company delivering a parcel and swiping the NIR ID card in a card-reader in order to verify the recipient's identity. See: Home Office website [Online] <http://www.ips.gov.uk/identity/scheme.asp> [14 August 2008].

<sup>21</sup> Evidence submitted to Home Affairs Committee Fifth Report of Session 2007-8 (ev 172).

20. Electronic profiling is used by the Home Office in the e-borders scheme, which collects and analyses information relating to all persons intending to travel to, or from, the UK. The Home Office describes profiling on this scheme as:

In a border control environment the profile is those combinations of characteristics which might identify an individual as being potentially high risk. The fact that a passenger matches that does not mean that he is a criminal or even a suspect, only that there is a case for further investigation.<sup>22</sup>

21. Among the most objectionable forms of electronic profiling is racial or ethnic profiling, a form of racial discrimination, in which persons are singled out on the basis of their actual or perceived ethnicity. This can be conducted through data on ethnicity, where held, or through crude proxies such as names.
22. While there is no evidence of the intention to use the NIR for profiling purposes, there is a danger that without adequate safeguards, this could happen, including in circumstances whereby information is passed outside of the jurisdiction.<sup>23</sup>

#### *Amendments and Ministerial discretion*

23. A further concern is the number of issues which are not set out in the primary legislation (the two Acts) but are left to regulations, which in practice leads to the application of Ministerial discretion and not necessarily the much greater degree of scrutiny of primary legislation which can ensure human rights compatibility.
24. Some of the powers which the *Identity Cards Act 2006* vests in the Secretary of State by Order/regulations include the power to make regulations to decide the categories of people for exclusion from entitlement to register (and, therefore, from services that require use of the card); modify the age (16 years) for UK residents registration entitlement; "consider" that registration of individual data would be consistent with statutory purposes and then compel (without consent) registration on the NIR (if the state finds your information elsewhere); and to designate documents whose issue or renewal prompts registration.

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<sup>22</sup> UK Borders Agency FAQ e-borders <http://www.ukba.homeoffice.gov.uk> [16 April 2008].

<sup>23</sup> An example of automated profiling systems is the US 'ATS' or Automatic Targeting System database, which media reports have reported criticism of as an "electronic fishing expeditions" with software taking "automated decisions... without human involvement" See: 'How America is snooping on you' in *The Daily Mail* [Online] 5 July 2008 [18 July 2008].

### *Costs of the National Identity Scheme*

25. There is also the issue of the impact of being directly or indirectly compelled to pay the cost of the NIR and the linked ID Card. The *National Identity Scheme Delivery Plan 2008* does not set out any costs or charges. Costs could be arrived at through application fees for the card, fees for updating or correcting information on the NIR, higher passport fees, higher visa process fees, and through general taxation. Costs could be staggered through private sector involvement. There are a range of official and unofficial estimates as to the likely cost to both individual and taxpayer of the NIR and linked ID Cards. The Home Office is presently indicating that the ID card will cost around £30. UK opposition parties, meanwhile, have cited around £90 for a combined passport and ID card package. A London School of Economics study has indicated the unit cost may rise to as much as £300 (an overall cost of £20 billion) with costs being shared by applicants and taxpayers.<sup>24</sup>

### *Registration technology and social exclusion*

26. There is concern that many disabled persons, persons over 75 and minority ethnic groups may be unable to register the required biometric data or have their data read by biometric readers. Therefore a number of categories of people face either exclusion from the system or, more likely, potentially undignified and intrusive methods to obtain their biometric information.<sup>25</sup> Furthermore the *National Identity Scheme Delivery Plan 2008* sets out the suggestion of private sector involvement in subcontracting biometric enrolment services expressing a desire to create a market to provide "a choice of competing services which should maximize convenience and drive down price". This may make it simpler for some groups to register, but more costly or difficult for minorities.

### **NIR ID cards: The two-tier system**

27. Two separate pieces of legislation have set up two separate ID card schemes linked to the National Identity Register. Official documents and discourse usually refers to the two groups as 'British citizens' and 'foreign nationals', although these shorthand terms are misleading.

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<sup>24</sup> See: [Online] accessed [13 October 2008] <http://www.libdems.org.uk/noidcards/>  
[http://www.conservatives.com/Campaigns/ID\\_Cards\\_Labours\\_Bad\\_IDea.aspx](http://www.conservatives.com/Campaigns/ID_Cards_Labours_Bad_IDea.aspx)

<sup>25</sup> See 'Privacy International UK Identity Cards and Social Exclusion', 30 May 2005 and 'ID Card Scheme faces new hurdle', 15 August 2008 in *The Guardian*

28. The *Identity Cards Act 2006*<sup>26</sup> brought in the National Identity Register and essentially the scheme aimed at “British Citizens”. The scheme aimed at “foreign nationals” was introduced by the *UK Borders Act 2007*, which introduced compulsory identity cards (termed as Biometric Identity Documents or BIDs).
29. The *Identity Cards Act 2006* grants powers to exclude categories of persons from NIR registration. This includes short-term visitors, including tourists, but also in the context of Northern Ireland cross-border workers.<sup>27</sup> Irregular migrants can also be excluded from registration and hence potentially essential services dependent on registration.

*Scheme for non-EEA migrants ('foreign nationals')*

30. The term ‘foreign nationals’ is used prominently in official discourse on ID Cards and can be misunderstood as referring to non-British citizens. In the consultation document, *Compulsory Identity Cards for Foreign Nationals*, it is left to a footnote to clarify the definition of ‘foreign nationals’ as persons subject to immigration control requiring leave to enter or remain under the Immigration Act 1971. This, therefore, does not include Irish citizens or other European Economic Area<sup>28</sup> (EEA) nationals, the latter of whom are the majority of new migrants to Northern Ireland. It also does not cover non-EEA citizens who are immigrants (that is, with permanent residence), nor short term visitors.

*Scheme for other UK residents ('British citizens')*

We will introduce biometric identification for foreign nationals in 2008 and we expect the first ID cards to be issued to British citizens in 2009. ... If you are not a British citizen but live in the UK your residence permit, residence card or registration certificate will be in the form of an ID card.<sup>29</sup>

31. Discourse alluding to the broader identity scheme being for ‘British citizens’ creates confusion as regards the position of Irish citizens. In fact, the scheme geared at ‘British citizens’ is intended to cover NIR

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<sup>26</sup> The Bill had a rocky ride through Parliament and the plans were rejected by the House of Lords on five occasions and received Royal Assent on 30 March 2006

<sup>27</sup> The referenced time period has been of a visit of three months or less but this may change. Government had proposed to reduce the time permitted for tourist visas from six months, to three months. However, following recent consultation, it has indicated an intention to keep the visa duration to up to six months. *Government Response to the Consultation on Visitors*, Home Office, UK Border Agency, June 2008.

<sup>28</sup> The European Economic Area is the European Union plus Norway, Iceland and Lichtenstein. Switzerland also has freedom of movement.

<sup>29</sup> Home Office Identity website [Online], available at: <http://www.ips.gov.uk/identity/scheme-what-how.asp> [14 August 2008].

registration for all persons over 16 resident in the UK (including Northern Ireland) other than those covered by the scheme for non-EEA migrants.

32. The scheme therefore covers NIR registration for British citizens, non-EEA immigrants, Irish citizens and other EEA nationals. However, the same type of ID card may not be issued to these groups. The particular circumstances of Irish citizens in Northern Ireland are discussed later in this paper.

#### *Differences in the two schemes*

33. There are a number of differences between the scheme for non-EEA migrants and that for other UK residents. In particular:
- Children will be subjected to the non-EEA migrants scheme. The scheme for other UK residents is currently for over 16s.
  - The level of compulsion for registration is absolute in the non-EEA migrants scheme.
  - The scheme for non-EEA migrants is backed by a severe sanctions regime incorporating civil penalties (fines) and immigration sanctions including an obligation to effectively leave the country<sup>30</sup>. There is also the sanction of not issuing an ID card. Sanctions apply in relation to compulsion to register<sup>31</sup>, maintain data and use the card in particular circumstances<sup>32</sup>.
  - The *Identity Cards Act 2006* contains the power to allow the provision of public services to be conditional on identity checks.

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<sup>30</sup> Immigration sanctions are namely the 'disregarding' or refusal of an application to enter or stay in the UK, or a variation (curtailment) or cancellation of a person's existing permission to enter or remain in the UK. The basic penalty for initial failure to comply with a primary requirement will be one-quarter of the maximum statutory penalty (currently £1,000). See: *Code of Practice Compulsory Identity Cards for Foreign Nationals*, Home Office consultation document, February 2008.

<sup>31</sup> For persons compelled to register, this can encompass being subjected to interview, photographing, fingerprinting, other biometric information and to "otherwise provide" unspecified "information" required by the Secretary of State (See: Section 7 of the *Identity Cards Act 2006*).

<sup>32</sup> The *Code of Practice Compulsory Identity Cards for Foreign Nationals*, Home Office consultation document, February 2008 references duties to report lost, stolen, altered or damaged cards, when information has become false or misleading or incomplete, and a requirement to "comply with any other requirement specified in the biometric registration regulations" it also references "the requirement to use the card in particular situations" however, these circumstances are not set out in the document; Section 5(1). *UK Borders Act 2007*, provides powers for Ministers to make regulations requiring the use of the ID card for non-EEA migrants, and to disclose personal information for immigration purposes or other "specified" circumstances where a "question arises" about a persons status in relation to nationality or immigration.

In the scheme for other UK residents this excludes public services which are provided for free. However such services are included for those subject to compulsory registration.<sup>33</sup>

- There are protections in the Act against requirements to produce actual identity cards for matters other than public services or when alternatives are not available. However, the legislation exempts non-EEA migrants and others subject to compulsory registration from these protections.<sup>34</sup>

34. As referenced earlier, the Commission is of the view that the British National Identity Scheme engages Article 8 ECHR. The fact that the different regime set out in the UK Borders Act only apply to non-EEA nationals engages Article 8 and Article 14, (the latter prohibits discrimination on the basis of a number of grounds including race or national origin). In addition in specific reference to the compulsory registration of children under the non-EEA migrants scheme the state has obligations under the UN Convention on the Rights of the Child whereby policies and legislation affecting children must have the best interests of the child as the paramount consideration.
35. Many of the concerns regarding discriminatory impact on 'foreign nationals' and, more broadly, minority ethnic groups have been raised by a range of human rights and anti-racism groups in Great Britain.<sup>35</sup> The particular circumstances of Northern Ireland in relation to the land border and registration of Irish citizens add a further dimension to such concerns.

#### *Exclusion or fear of accessing essential services*

36. There are a number of issues that arise in the context of powers to make the provision of public services conditional on identity checks; powers to sanction non-EEA migrants for non-compliance by refusing to issue an ID card; and broader powers to exclude irregular migrants from registration. Non-EEA migrants (along with many others) may wish to contentiously object to NIR registration, there are also a range of reasons whilst an individual may fall into an irregular status, or be perceived to be so.
37. In Northern Ireland, a young Ukrainian woman suffered so severely from frostbite in December 2004 that she had to undergo the

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<sup>33</sup> *Identity Cards Act 2006*, Section 13(2).

<sup>34</sup> *Ibid*, Section 16(2)(3).

<sup>35</sup> See, for example, Kundnani A, *ID Cards: Implications for Black, Minority Ethnic Migrant and Refugee Communities*; Joint Council for the Welfare of Immigrants, ID card discrimination campaign; National Assembly Against Racism, *Briefing on the Impact of ID Cards on BME Communities*, 31 October 2005.

amputation of her legs. Reportedly, the woman had been on a work permit but had lost her employment. In circumstances where destitute persons are at severe risk, the state has positive duties under Article 3 ECHR to prevent such persons from undergoing suffering of a kind that could engage Article 3. The NIS and related measures may actively discourage migrants (including children) from accessing potentially lifesaving treatments and therefore engage human rights compliance.

38. There are other circumstances whereby the non-EEA migrant ID card will be requested, such when travelling, but also on commencing employment. Migrants without the card may find themselves in effective 'limbo' status. This includes those refused a card but also those who are awaiting card details to be processed (for first registration or replacement) who are disproportionately suspected of being ineligible and have no card to prove entitlement. A worst case scenario is the creation of an effective 'underclass' of persons who lack entitlements and fear approaching essential public services (for example, health and social protection) and are open to abuse and exploitation in the workplace. For example, an irregular migrant in need of emergency health treatment may not even attempt to access it for fear that his/her immigration status will become known to the authorities, with deportation as a consequence.

#### *Dangers of racial profiling*

39. The Commission is also concerned that the scheme may initiate, or exacerbate racial profiling or other racially discriminatory practices. There are different groups of persons who will, or will not, be registered and who will, or will not, be required to present the card for specified purposes. It would seem inevitable that individuals who 'do not look like' EEA (or 'European') nationals will be asked to produce identity cards more often than those who 'do'. It is not an unreasonable assumption that, for the most part, it will be individuals from a minority ethnic background who are likely to be asked to produce identity documents, whether they are legally obliged, or able, to hold such documentation or not. If such documentation is not produced when requested, the question arises of how the relevant agency or employer will ascertain whether the individual in question is an EEA national, and when, and from whom, alternative documentation will be accepted. This means many persons who are from minority ethnic backgrounds will have to face constant questioning, or accusations, regarding their status.
40. Racial profiling is not a human rights-compliant exercise, engaging, in this context, rights including Articles 8 and 14 of the ECHR. Through the NIS and other initiatives, a range of government agencies are

being empowered and expected to implement internal immigration control.

41. The confusing manner in which the terminology around the scheme has been presented in relation to “compulsory identity cards for foreign nationals” may exacerbate confusion with, for example, an employer expecting a Polish, Portuguese or other EU national to present a ‘foreign national ID card’ before commencing employment, and declining employment to those who cannot.<sup>36</sup>
42. The dangers are exacerbated by the manner of phased introduction, through which non-EEA migrants are compelled to register for the card before others. The situation where some groups of persons are registered and others are not is likely to be particularly long-term, if not permanent, in the case in Northern Ireland, given the context of Irish citizens.

*Risks of racial stereotyping and cultures of suspicion*

43. Given the lack of public support for the NIS, government will need to engage in considerable persuasion to promote registration. There is a danger that this will play on public fears. Further, given the weakness in other justifications for the scheme government is likely to turn for justification to the themes of combating ‘illegal’ immigration and working. Indeed the phased roll out of the scheme has commenced with ID cards for non-EEA migrants on student or marriage visas, given the Home Office regards these as the categories at “most risk of abuse”.<sup>37</sup> In addition, given the severity of the sanctions for non-compliance with the compulsory identity cards for non-EEA migrants, it is likely that the Home Office will seek extensive publicity in order to inform persons of the regulations to which they will be subject, particularly as the sanctions set out for non-EEA migrants apply to those who have been resident for some time, as much as to new migrants.
44. The Commission has urged that efforts to market the scheme should avoid playing on public fears and, in particular, those that could enhance racist stereotyping. The Commission has urged that any strategy to inform employers of the scheme does not oversimplify, or

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<sup>36</sup> There is evidence of existing problems in Northern Ireland in this regard, in relation to perception on basis of accent or skin colour. For example, we are aware of cases where Portuguese citizens of Timorese origin have not been able to register with GP surgeries because the surgeries had requested to see a ‘work permit’ as proof of residency. The surgeries seemed unaware that EU nationals neither require, nor can have, a work permit. Such confusing scenarios are only likely to increase as identity cards for non-EEA migrants are introduced.

<sup>37</sup> See: [Online] <http://www.bia.homeoffice.gov.uk/sitecontent/newsarticles/identityschemeplan> [6 March 2008].

promote the scheme out of the context of existing race relations legislation. Equally, promotion needs to be sensitive to avoiding the creation of a culture of suspicion against those who do not wish to have ID cards or be registered on the NIR.

45. Official discourse to date has been a source of concern. Clearly there will also be considerable media discourse. There is potential for stigmatisation of migrant, Muslim or other minority ethnic communities through any discourse that indicating that the vast NIR linked ID card scheme is required to control their alleged abuse and deviance. Such stigmatisation can lead to, or intensify, a climate of hostility against migrants and perceived migrants. In Northern Ireland, existing discourse has coincided with an alarming rise in racially motivated attacks.

#### *International standards against racial discrimination*

46. The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) contains a range of standards in relation to racial discrimination, some of which apply universally and others to citizens. The Article 1 of the Convention defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

47. The UN has issued a soft law General Recommendation that clarifies the responsibilities of state parties to ICERD in regard to non-citizens.<sup>38</sup> This means that, under ICERD, differential treatment based on citizenship or immigration status will constitute discrimination if not proportional and pursuant to a legitimate Convention aim. Relevant Articles include:

Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large; (Article 12)

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<sup>38</sup> General Recommendation No 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

## Voluntary or compulsory?

### *Registration and identity cards: voluntary or compulsory*

48. The degree of compulsion for registration on the scheme for non-EEA migrants is absolute, with legislation providing for compulsory registration. Most official discourse on the broader scheme markets it as 'voluntary'. This is illustrated, for example, by the following extract from sections of the executive summary of the recent delivery plan, entitled *Increasing Choice* and a *Twin Track Approach*, respectively:

- From 2011/12 individuals who enrol on the NIR will be able to choose whether they have an identity card, a passport or both. Over time, this choice could extend to other documents such as the driving licence.
- From 2011/12 we shall start to enrol British Citizens at high volumes offering a choice of receiving a separate identity card, passport or both.
- .... we will begin issuing cards, on an entirely voluntary basis, to those customers where there is the greatest personal benefit to the in their daily lives from having or using an identity card.<sup>39</sup>

49. References to "individuals who enrol", or "choice of receiving an identity card", or "entirely voluntary basis" may give the impression that the registration with the NIS is voluntary. The issue of compulsion may well be clouded by the issue of whether an individual is obliged to physically take an identity card, rather than register on the NIR. It is the collection, storing and disclosure of information on the NIR that raises human rights compliance issues, rather than the physical receipt of a card. Therefore, the issue of compulsion should be examined in the context of NIR registration.

50. The long-term intention is for NIR registration and the associated ID Cards to be compulsory, albeit compulsion of a different degree to that faced by non-EEA migrants. Indeed, it would require blanket registration if the NIS is to be used for the range of purposes the Home Office intends:

The National Identity Scheme will eventually become compulsory. This means that all UK residents over 16 will need to have an ID card.<sup>40</sup>

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<sup>39</sup> Executive Summary, Home Office *NIS Delivery Plan 2008*.

<sup>40</sup> See: [Online] <http://www.ips.gov.uk/identity/scheme-what-how.asp> [14 August 2008].

51. There is also the issue of *indirect* compulsion to register, have, use, or carry an ID card. Namely where it would be either impractical or impossible to engage in everyday life without an ID card, including enjoying actions that are basic human rights. These include rights to health, education, work, freedom of movement and social protection.

*Rights to Freedom of movement*

52. The primary compulsion route for British citizens for NIR registration has been the issue or renewal of British passports. While there are some ambiguities, along with a change in timescale and the option of not having to take away the actual ID card on registering, the 2008 delivery plan does not appear to change the position that entry onto the NIR will be compulsory when applying for, or renewing, British passports.

53. This engages the right of freedom of movement as conscientiously objecting to data being placed on the NIR would effectively prevent a person's passport application from being processed further. Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR) permits all persons to be free to leave any country including his/her own. The UK is a party to the ICCPR and the Commission does not feel it is appropriate to coerce British citizens into the scheme through threatening their rights to freedom of movement. Article 12(2) states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

54. It is still unclear if powers will be taken to compel registration when issuing other documents, such as driving licences.
55. Non-possession of the card (for those without passports) could also inhibit freedom of movement within the Common Travel Area (CTA). The CTA has been in existence since the 1920s and is composed of the UK, Republic of Ireland, Channel Islands and the Isle of Man, within which British and Irish citizens are not required to carry passports. There are, however, major reforms being proposed which would affect the CTA where, in the context of passports not being held by everyone, ID cards could, potentially, be a requirement in order to cross internal or external borders. The proposals include the

introduction of routine immigration and document checks on air and sea routes between the Republic of Ireland and the UK (including Northern Ireland). This would involve the requirement of passports or ID cards from non-CTA nationals and “satisfactory evidence of identity and nationality” of CTA nationals (from approved documents to be determined through consultation). The proposals indicate that there is no intention to introduce fixed immigration controls on the border between the Republic of Ireland and Northern Ireland, but that there will be consideration of increasing “ad hoc immigration checks on vehicles to target non-CTA nationals” on the Northern Ireland side of the border.<sup>41</sup> It is also reported that the Home Office will issue a further set of proposals later this year, in relation to travel between Northern Ireland and Great Britain.<sup>42</sup>

### *Rights to Employment and Public Services*

56. The UK is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which outlines a number of standards including rights to health care, social protection and an adequate standard of living. Relevant Articles include:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work... (Article 7, extract)

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.... (Article 11 (1), extract)

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (Article 12 (1))

57. In the Commission's view, it is wrong to threaten access to employment, movement or essential services to compel registration.
58. One currently planned measure for directly compulsory NIR registration and identity cards is for those working in airports. This will subsequently extend to those working in other as yet undecided “sensitive locations”. Given as objection to the NIR is likely to be higher among Irish nationals this has major implications for fair employment in such industries and may lead to significant industrial upheaval.

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<sup>41</sup> See: “*Strengthening the Common Travel Area*”, Home Office UK Border Agency Consultation Paper, 24 July 2008.

<sup>42</sup> ‘Border checks between Britain and Ireland proposed’, in *Daily Telegraph*, 25 July 2008.

59. Measures to whereby non-EEA migrants are compelled to present ID cards on commencing employment will lead to the *de facto* compulsion of persons who are not non-EEA migrants but are 'suspected' of being so to register on the NIR and obtain an ID card to prove their citizenship or migration status. This will particularly impact on minority ethnic groups as will a further proposal to link obtaining a sponsor licence for a visit by non-EEA family members to the "roll out of national identity cards".<sup>43</sup>
60. If the devolved administration in Northern Ireland takes a decision to make registering or accessing public services (including those as routine as GPs or libraries), dependent on NIR registration this means that anyone wishing to access such a service will de facto be compelled to register.

*Carrying the ID card? Voluntary or Compulsory*

61. The *Identity Cards Act 2006* expressly prevents regulations that would "require an individual to carry the card with him [/her] at all times", as does the *UK Borders Act 2007*. However, the level of checks envisaged under the NIS may make it practically necessary for some persons to carry a card at all times, particularly persons from minority ethnic backgrounds who are likely to be disproportionately targeted for checks.
62. In the context of proposals to increase *ad hoc* immigration checks on the land border and elsewhere, it is worth emphasising that there are existing powers of detention under immigration legislation. Potentially, this could lead to British, Irish, or other EEA nationals having to carry ID cards (or passports) or run the risk of being suspected of immigration offences and, therefore, subject to detention until they can otherwise verify their identity. Such operations are highly likely to adversely impact on persons from minority ethnic groups.
63. The official use of terms such as "compulsory identity cards for foreign nationals" could also be interpreted as an invitation to a 'papers please' environment, where there is an expectation that foreign nationals carry cards. A culture of suspicion may develop against foreign nationals (or perceived foreign nationals) who do not permanently carry the card, even when there is no requirement to do so.

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<sup>43</sup> In reference to proposals for 'sponsor licences' tied to family visitor visas, see paragraph 5.4 of *Government Response to the Consultation on Visitors [visas]*, Home Office, June 2008.

64. Given the unprecedented level of checks, the overall NIS scheme anticipates in a worst case, but not entirely unrealistic, scenario that the measures could lead to an effective police state for migrants or, more broadly, for persons from particular minority ethnic groups who are suspected of being migrants.

## Specific impacts in Northern Ireland

...the potential implications from an Irish perspective, which are unique to the Irish-British situation, were not considered in any great detail prior to the enactment of the British ID Cards legislation.

...the introduction of British ID Cards, in tandem with other initiatives such as e-Borders, have the potential to affect significantly the operation of the Common Travel Area that exists between Ireland and Britain.

*Conclusions of British-Irish Inter Parliamentary Body Inquiry*<sup>44</sup>

65. If the scheme proceeds, government is likely to encounter many difficulties in achieving its aim of universal coverage. This is likely to be particularly the case in Northern Ireland.

## Irish identity, citizenship and the NIS

66. A central issue for Northern Ireland is the situation of Irish citizens regarding NIS ID cards. Recent figures show that 400,000 Irish passports have been issued to Northern Ireland residents in the last 10 years.<sup>45</sup>
67. The Irish Government does not have a national identity card, and has stated that it has no plans to introduce one. However, it is planning to begin to issue state-wide photographic public service cards later in 2008, to replace a number of current cards for accessing social welfare, revenue and public services. Given the context of the Common Travel Area and the introduction of British ID cards, there is considerable pressure for ID cards to be issued and concern among civil liberties groups that the card, while being marketed as a rationalisation of existing public service cards, may in effect be an embryonic national identity card.<sup>46</sup> Further, the National Consultative

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<sup>44</sup> Committee on Sovereign Affairs *Report on the Implications for the Common Travel Area of the introduction of British ID Cards*.

<sup>45</sup> Irish government figures indicate that 402,625 passports were issued to Northern Ireland residents between 1998 and 2008 with the annual figure doubling between 2002 and 2007 (source: *Irish News*, 2 July 2008).

<sup>46</sup> 'Irish bus pass is "identity card by stealth"', *The Times*, London, 10 August 2008; 'Free travel pass holders first in line for photo ID benefit cards', *The Irish Times*, 5 August 2008.

Committee on Racism and Interculturalism (NCCRI)<sup>47</sup> has raised concerns that the introduction of a partial system of ID cards and their increased use to access key non-emergency public services, has the potential to lead to increased racial profiling. The NCCRI recommends that if ID cards are to be issued they should not be only issued to non-EEA citizens and that, if they are introduced for non-EEA nationals, adequate training and guidelines need to be introduced to prevent such profiling.<sup>48</sup>

68. The right to Irish citizenship for all persons born on the island of Ireland has been enshrined in the Irish Constitution since the inception of the state. The Belfast (Good Friday) Agreement recognised rights to both British and Irish citizenship and identity, as follows:

...recognise the birthright of all the people of Northern Ireland<sup>49</sup> to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.  
*Paragraph 1(vi) Belfast (Good Friday) Agreement*

69. Many of those who express their national identity as Irish and take Irish Citizenship are likely to be resistant to carrying British ID cards and, by extension, to register on the British National Identity Register. This is particularly likely to be the case if the card identifies the carrier as a British citizen and carries British symbols.<sup>50</sup>
70. It is a human rights principle that no discrimination should ensue from the enjoyment of human rights on the basis of political opinion and, therefore, for example, in the context of Northern Ireland, through identification as a Unionist or Nationalist. The two core UK human rights instruments dealing with civil and political rights (ICCPR) and economic, social and cultural rights (IESCR) include anti-discrimination clauses that encompass political opinion. Further, it is a human rights principle that national minorities within a state do not

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<sup>47</sup> The NCCRI is a public body, established in 1998 as an independent expert body focusing on racism and interculturalism.

<sup>48</sup> NCCRI, *Submission to the Joint Committee on Justice, Equality, defence and Women's Rights Immigration Residence and Protection Bill 2008*.

<sup>49</sup> In Annex 2 to the agreement the British and Irish governments declare their joint understanding that the term "the people of Northern Ireland" in the above paragraph refers to "all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British Citizen, an Irish citizen or who is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence."

<sup>50</sup> The model for the 'British Citizen' ID card is yet to be revealed. In September 2008 the Home Secretary revealed the design of the ID card for Foreign Nationals. The Union Flag, anticipated in some designs, has been dropped and replaced by the Royal Crest. See 'ID Card design revealed by Home Secretary' *The Guardian* 26/09/08;

suffer disadvantage through identification as such. The Council of Europe's Framework Convention on National Minorities (FCNM), to which the UK is a party, sets out a range of relevant standards including:

Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice (Article 3 (1))

71. The central route to compel NIR registration for the UK residents ID scheme is the process of renewal of, or application for, a British passport. This will particularly impact on the Unionist community in Northern Ireland, but will not compel Irish citizens to register.
72. Clearly, there will be many British citizens and others, who for reasons of civil liberties, would contentiously object to NIR registration. The inter-parliamentary report, explained above, references particular sensitivities in Northern Ireland as regards the implementation of the scheme:

...in implementing the ID card proposals [the British government gives] due consideration to the particular sensitivities of residents in Northern Ireland – including their rights under the terms of the Good Friday Agreement ....<sup>51</sup>

### *Impacts of Non-registration*

73. Given that the Nationalist community is a considerable proportion of the population, the non-registration of Irish citizens, in particular, is likely to render the NIR unworkable in Northern Ireland. The alternative is the unthinkable mass exclusion of those who are Irish citizens from public services, along with impeding access to employment and freedom of movement. This would have major impacts on the ability to enjoy human rights without discrimination. The system is, therefore, never likely to function in Northern Ireland as the Government intends.
74. For example the production of an identity card as part of a pre-employment check could be unworkable in Northern Ireland as it would impact on the right to work without discrimination, in particular of Irish citizens. This is directly the case with the proposal of compulsory registration and identity card possession for those working in airports and, subsequently, other (as yet undefined)

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<sup>51</sup> British-Irish Parliamentary Body Committee on Sovereign Affairs, *Report on the Implications for the Common Travel Area of the introduction of British ID Cards*, April 2006 [Online] available at: <http://www.biiipb.org/biiipb/committee/comma/11902.htm> [2 July 2008]

locations. More generally, if non-EEA migrants are expected to produce ID cards as part of pre-employment checks, Irish citizens may be impeded from taking employment if they are wrongly perceived as requiring such cards.

75. Irish citizens have different entitlements which are not available to other EEA nationals.<sup>52</sup> This includes the right to vote in Westminster parliamentary elections. Should British ID cards become valid ID in order to vote and other forms of acceptable ID are restricted, this could lead to disenfranchisement.<sup>53</sup>

*Common Travel Area:*

76. There is also the issue of the Common Travel Area (CTA) between the UK and Ireland, as discussed earlier. British and Irish citizens do not have to possess, carry or show passports to travel within the CTA. With the backdrop of the introduction of the British NIS and related ID cards, it is currently proposed to erode this arrangement. In the context of proposals for increased 'ad hoc' immigration checks on the land border between Northern Ireland and the Republic (and more general travel throughout the CTA), Irish citizens who are resident in Northern Ireland may not have NIR linked ID cards and may also not be eligible for the state-wide Irish public service card, which may be accepted ID for travel. Such checks could disproportionately lead to travel being impeded, or even to the detention of Irish citizens until their identity is established. It would not be unreasonable to assume that this would disproportionately impact on minority ethnic Irish citizens. This, again, would be a regressive step in relation to the UK Government's commitments under the Framework Convention for National Minorities, which states:

The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage. (Article 17)

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<sup>52</sup> Including rights of British and Irish nationals to live and work freely in each others countries. Other EEA nationals can do so through exercising treaty rights.

<sup>53</sup> The right for citizens to vote and participate in public affairs is inscribed in Article 25 of the ICCPR, to which the UK is a party. The recent Goldsmith report into British citizenship floats the idea of heavily restricting the right of Irish citizens to vote in Westminster elections to those who "have connection to Northern Ireland". The report states: "Anyone who exercises their right under the [Belfast / Good Friday] Agreement to identify themselves as Irish and to take up Irish citizenship should not lose their right to vote in Westminster elections as a result of any change made to restrict voting rights to UK citizens. Hence it would be necessary to distinguish this group of Irish citizens from others". (Citizenship: Our Common Bond, para 20, part 4).

77. The above scenario would also apply to the situation of British citizens resident in the Irish Republic who travel to Northern Ireland, who are either not eligible, or do not wish, to apply for a British ID card.

*Government response to specific impacts*

78. A number the above concerns were raised within the inquiry by the British-Irish Parliamentary Body into the introduction of British ID Cards, which reported in April 2006. The Committee sought responses from government regarding its concerns.<sup>54</sup>
79. The Committee raised the issue of Irish citizens in Northern Ireland, who would wish their ID card to state their nationality as Irish. The Home Office has indicated that they may issue a card stating nationality as Irish or without nationality, but it would not be equivalent to a British ID card, more reflecting the status of resident permits issued to other EEA nationals. The proposals do not envisage a card allowing for dual nationality.
80. The Committee also states that the “proposal raises concerns with regard to the potential for discriminatory treatment as a result of designation or non-designation of citizenship”. This is a reference to circumstances in which Irish citizens in Northern Ireland could either not carry a card or carry a different ID card. This situation would lead to a method of *de facto* identification of community background based on perception and raises the potential for discriminatory treatment of those who wish to identify as British or Irish.
81. In its response to the Inter-Parliamentary Committee, the Home Office’s position was that the introduction of British ID cards will not impact on the Common Travel Area. However, the Committee notes that even the potential “plain ID card” stating nationality as Irish, or not stating nationality, will be marked “not valid for travel” as it will not be valid for travel across the EEA. British NIS ID cards, like other EU national identity cards will be valid for travel within the EEA. This would mean the ‘plain ID card’ could be used to travel within the CTA, but the Committee notes the “considerable potential for confusion to arise in practice” given the “not valid for travel” marking.
82. Notably, if Irish citizens are exempt from carrying British ID cards (as indicated in the government response) this will not mean exemption from details being entered on the National Identity Register. However, if an Irish citizen does not wish to carry a British ID Card, they are also unlikely to want their data entered on NIR, to which the

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<sup>54</sup> The Committee also examined issues regarding British citizens resident in the Republic of Ireland and Irish Citizens in Great Britain.

ID card is just the portal. The Committee report states that, with reference to Irish citizens, compulsion to include personal data on the NIR may be particularly problematic in Northern Ireland.

83. There have been no further indications as to the consideration of issues facing Irish citizens in Northern Ireland in official NIS consultation documents subsequent to the response given to the Inter-Parliamentary body in 2006. The Commission wrote to the Northern Ireland Office (NIO) in late May 2008, requesting clarification. At the time of writing, a response is yet to be received. The *News Letter* has reported that the NIO holds a document which discusses the issue of ID cards in Northern Ireland, which it has declined to issue in response to a Freedom of Information request from the newspaper. The NIO did, however, reiterate that registration becoming compulsory in order to access public services in Northern Ireland is a decision for the Northern Ireland Assembly.<sup>55</sup>

### **Examining the Government's case for the scheme**

84. Further assessment of the UK's compliance with its human rights commitments can be conducted through examination of whether the interference in private life (Article 8 ECHR) is proportionate and in pursuance of a legitimate aim. Such an assessment is complex. Official discourse has changed emphasis as to the reasons and rationale for introduction of the NIR. Where aims are stated, there needs to be clear evidence that the NIR will actually be effective in achieving the aims.
85. As set out earlier, the limitation clause of the ECHR right to privacy (Article 8(2)), lists the following areas: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.
86. The purposes of the NIS are set out in the 2006 Act and have been frequently referred to in official discourse. They can be summarised into the following five areas:
- convenient method to prove identity
  - prevention of terrorism
  - prevention of 'illegal' immigration and working
  - prevention of benefit fraud / abuse of public services, and
  - prevention of "identity fraud".

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<sup>55</sup> 'NIO refuses to reveal identity cards details', in *News Letter*, 23 July 2008.

87. An assessment of each of these asserted purposes against the legitimate aims qualified in Article 8(2) ECHR and the proportionality of the response raises questions about the compatibility of the proposals.

*A convenient method to prove identity?*

88. Little evidence has been presented that the majority of the population has significant difficulty in routinely proving identity. In addition the complexity of the NIR, its registration process, its maintenance and intrusion are not proportionate to convenience. A much simpler scheme could be more convenient.

89. There are a number of minorities groups who do have difficulty proving identity. These include socially excluded persons such as those on low incomes, who are less likely to have credit cards, mortgages, utility bills or other items that assist in proving identity. It also includes migrants who are more susceptible to constant questioning of their identity and status.

90. A blanket scheme as broad as the NIR is not required to address such problems. In addition, as this paper has outlined, is indeed likely to exacerbate exclusion for such groups. An examination of how to address the exclusion of such groups should begin with the causes of such exclusion. Such matters may be resolved by reassessing statutory staff training or the need for restrictive interpretations of acceptable forms of ID within rules and legislation. A genuinely voluntary simple ID card scheme for persons who are excluded from other forms of ID may also meet such a gap. Indeed to an extent the Northern Ireland electoral ID card has gone some way to doing this.

*Prevention of terrorism*

91. There have been assertions that NIR linked ID cards will contribute to the legitimate aim of 'preventing terrorism', yet *how* this would be the case has not been satisfactorily answered. Simply stating that the measures will contribute to a legitimate aim under Article 8(2) without reliable evidence is not sufficient. Ministers have effectively conceded that the case for NIR linked ID cards in relation to preventing acts of terrorism is weak, and this articulation has considerably diminished the stated rationale for the NIS.

92. Government counter-terrorism discourse, of late, has focused almost exclusively on Al Qaeda-inspired attacks. There is evidence and experience to suggest that an attempt to use NIR linked ID cards in this context may in fact be counter-productive. The Commission, has already raised concerns that post-2001 counter terrorism discourse

and measures appear to have targeted the entire Muslim community and has pointed out that the experience of Northern Ireland has shown that targeting entire communities in this way is not in keeping with human rights and has been an ineffective way of combating terrorism<sup>56</sup>. The alienation of entire communities may stem the flow of intelligence which counter-terrorism strategies are dependent on, and hence be counter-productive.

*Prevention of 'illegal' immigration and working*

93. The pejorative term 'illegal immigration' has no legal meaning and is not a term used in international human rights instruments. It is usually understood to mean unauthorised entry into the UK. There is no evidence that NIR ID cards will prevent initial unauthorised entry to the UK, as persons arriving at points of entry already have to carry a secure identity document (a passport). Government will argue NIR linked ID cards will assist in preventing continued presence without authorisation, such as persons who overstay visas, who are failed asylum seekers,<sup>57</sup> or are otherwise in breach of terms and conditions of entry. Such information is already set out in UK visas, in passports. There are serious questions regarding the proportionality of addressing such matters through the blanket NIS.
94. A further objective asserted by government is that the NIR linked ID card will help assist enforcement of prohibitions on unauthorised working or employment. This is usually taken to mean migrants working when their immigration status does not permit employment.<sup>58</sup> The Commission recognises the right of the state to regulate migration, in ways that ensure respect for human rights but has expressed serious concerns regarding the effectiveness and human rights impact of measures that solely target migrants in relation to tackling unauthorised work. In many cases, employers knowingly employ irregular workers due to their lack of rights (or remedies) to subject them to substandard conditions. Further empowering abusive employers to expect documents increases their control over an employee.
95. There is already legislation obliging employers to conduct document checks on a list of approved documents (for example, passports) on

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<sup>56</sup> Submission to Council of Europe Advisor Committee on the Framework Convention for the Protection of National Minorities - May 2007  
<http://www.nihrc.org/index.php?page=res&Itemid=61> [3 October 2008]

<sup>57</sup> Asylum seekers have already had to have a form of identity card for a number of years.

<sup>58</sup> The Commission has previously pointed out to government that the vast majority of unauthorised working is not carried out by migrants. The vast majority of 'illegal working' is carried out by British/Irish citizens and involves cash-in-hand work or other more costly forms of tax evasion.

employing individuals. NIR linked ID cards may be an additional measure to support this. However, using such cards to tackle irregular working may also lead to additional vulnerability to abuse and driving the phenomena of irregular working further underground leaving more persons unable to access formal, regulated and safe employment. The Commission's position is to urge rights-based strategies that should enable the state to pursue the legitimate aim of eliminating irregular working, without violating the human rights of migrant workers. This approach would focus on tackling the causes and incentives for irregular working.

#### *Prevention of benefit fraud and abuse of public services*

96. A further stated aim is that the NIR linked ID cards will help prevent benefit fraud in the general population. Opponents of the scheme argue that benefit fraud due to identity only constitutes around 2.5% small fraction of overall benefit fraud. The majority of benefit fraud occurs through working for cash-in-hand or working while claiming sickness benefit.<sup>59</sup> This, again, calls into question the legitimacy of pursuing the aim.

#### *Accessing public services*

97. Again, there is a question as to whether the level of intrusion is proportionate to the aim, and particularly in the case of Northern Ireland, whether such an aim is workable. Checks carried out to enable access to services are likely to develop further racial profiling and exclusion of persons who do not have the card on them, *or* are perceived as requiring the card when, in fact, they do not, *or* are in limbo due to loss of a card, *or* awaiting an application for a card, *or* when verification mechanisms do not work.

#### *Prevention of 'identity fraud'*

98. A final stated aim is the prevention of identity fraud crime through NIR linked ID cards. There is a question as to how effective NIR ID cards will be in preventing identity fraud, with some experts arguing such a system centralising data will in fact be counter productive.

### **The future of the scheme**

99. With a UK General Election likely in 2010, the future of the NIR linked ID card project is in doubt. Both the Conservatives and Liberal Democrats have, in opposition, pledged to abandon the scheme. General public opposition across the UK to the NIR and ID cards is

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<sup>59</sup> Sources: <http://www.no2id.net> and Liberty 'Prevent the Death of Privacy' campaign.

likely to further manifest itself as the scheme is rolled out, although this may be mitigated to an extent by measures to reduce up-front costs, and the stage-by-stage roll-out.

100. Many other aspects of the NIR remain undefined or undecided, including how issues specific to Northern Ireland will be resolved and rest with the NIO and Home Office. Whether NIR linked ID cards will be come a prerequisite for accessing Northern Ireland public services will be a decision for the Northern Ireland administration to take. Both of these matters remain to be addressed.