Bills drawn to the special attention of both Houses

Government Bills

1 Identity Cards Bill

Date introduced to the House of Commons	29 November 2004
Date introduced to the House of Lords	21 February 2005
Current Bill Number	House of Lords 30
Previous Reports	5th

Introduction

1.1 In our Fifth Report of this Session, we set out our preliminary views on the Identity Cards Bill.[3] This is a Government Bill, which completed its consideration in the House of Commons on 10 February 2005. It was introduced in the House of Lords on 21 February 2005.[4] On 26 January, we wrote to the Home Secretary raising a number of concerns relating to the human rights compatibility of the Bill, and requesting further information or clarification on a number of points. This report contains our conclusions on the human rights compatibility of the Bill, taking into account the response of the Home Secretary to our letter.[5]

The human rights engaged

1.2 Our concerns with this Bill relate to the protection of the right to respect for private life under Article 8 ECHR. The gathering, storage or disclosure of personal information, each interfere with the Article 8 right to respect for private life.[6] "Personal information" has been broadly interpreted by the European Court of Human Rights, to include information establishing personal identity.[7] Interference with privacy rights may be justified under Article 8.2, however, where it is sufficiently clear and foreseeable in its application to be in accordance with law; where it serves a legitimate aim under Article 8.2, and is necessary for and proportionate to that aim, and serves a pressing social need. Under Article 14 ECHR read in conjunction with Article 8, an interference with private life must not be unjustifiably discriminatory.

1.3 As we pointed out in our initial report on the Bill, neither ID cards, nor the obligation to hold or carry such cards, in themselves engage the right to respect for private life under Article 8 ECHR.[8] We do not therefore call into question the provision made in the Bill for the issue of ID cards which, as the Home Secretary points out in his

response, are the subject of long-standing schemes in many Council of Europe Member States. The difficulties of human rights compliance in this 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.

1.4 In his response, the Home Secretary emphasises that this Bill is enabling legislation. Since many of the details of the scheme have yet to be decided, and are to be set out in secondary legislation, "all the powers in the Bill are capable of being exercised compatibly and its human rights compliance has to be judged ultimately by looking at the Bill and all the orders and regulations made under it".[9] The Home Secretary points out that, under the Human Rights Act, all secondary legislation made under the Bill must be compatible with ECHR rights.[10]

1.5 We agree that the extensive enabling powers provided for under this Bill will mean that secondary legislation must be relied upon to ensure its human rights compatibility. However this Committee has repeatedly stressed the importance, where legislation intrudes on privacy rights protected by Article 8 ECHR, of safeguards being contained on the face of primary legislation, which is subject to much fuller parliamentary scrutiny.[11]

Information held on the Register

1.6 In our earlier report on the Bill, we expressed concern at the range of information which could be held as "registrable facts" on an individual's record on the Register,[12] and questioned whether the holding of such extensive personal information could be considered relevant to and necessary for pursuit of the Bill's legitimate aims. We asked the Home Secretary why it was considered that the gathering and storage of information under the Bill served a legitimate aim, and was a necessary and proportionate response to that aim.

1.7 The Home Secretary in his response states that "the information held on the Register is limited to that regarded as necessary for the functioning of the Scheme" and considers that, in general, the Register will only record information of a "non-sensitive nature", much of which would already be publicly available.

1.8 We do not accept the Home Secretary's implication that the public availability of some of the information to be held on the Register deprives it of the protection of Article 8. Identifying information, of the kind to be held on the Register, has been held by the ECtHR to fall within the protection of Article 8,[13] and the systematic recording and storage of such information engages Article 8 irrespective of whether the information is available elsewhere, and irrespective of whether it is further disclosed.[14] Entry of such information on the Register therefore in itself falls to be justified as necessary and proportionate to a legitimate aim under Article 8.2.

1.9 The Home Secretary in his response provided justification for the holding of particular registrable facts. In relation to the particular issue of second addresses, which are registrable facts under clause 1, the Home Secretary states that records of these will be necessary to allow for thorough checks before an individual is entered on the Register, and "to guard against criminals using an accommodation address whilst in reality using another address."

1.10 The material likely to be most intrusive of privacy is that held under clause 1(5)(h) and Schedule 1 paragraph 9 which allows details of previous checks against a particular entry in the Register to be recorded as part of that entry ("Schedule 1, paragraph 9 information"). The Government justifies holding such information as necessary to safeguard against inappropriate disclosure.[15] It points out that, if there were any complaint about how or by whom an ID card had been checked against the Register, the Schedule 1 Paragraph 9 information could establish the circumstances in which information from the Register had been accessed. Secondly, the Home Secretary notes the potential importance of this information for law enforcement agencies in the investigation of serious crime.

1.11 The Government also justifies holding "historic" information relating for example to previous nationality or

addresses, and Schedule 1 Paragraph 9 records of past checks on the Register, on the basis that such information will not be disclosable to private persons under clause 14. However, as we discuss below, such information may be disclosed to certain public authorities, and to persons other than public authorities in the investigation of serious crime.

1.12 We retain our concern at the scale of the personal information which may be held under clause 1, in respect of all persons holding ID cards, and potentially, under a compulsory scheme, in respect of all persons in the UK. Although, as is pointed out by the Home Secretary,[16] the Register is not intended to hold highly personal details such as medical records, it will be designed to hold records of checks against the Register where a person has accessed public services connected with their private life. This would record, for example, occasions on which healthcare or mental healthcare services had been accessed. The Register will also hold records of checks against the Register by previous employers or prospective employers, and by law enforcement agencies conducting criminal investigations.[17] As we have previously pointed out, the degree of intrusion of privacy is likely to increase over time, as records of checks against the Register accumulate. In our view, such information cannot be regarded as "non-sensitive" and its systematic storage on the Register amounts to a significant intrusion into private life rights protected by Article 8 ECHR, which must be strongly justified.

1.13 Whilst in some circumstances the gathering and retention of personal information such as is envisaged by the Bill will be justified, **we are concerned that the universal retention of this high level of information by way of compulsion in respect of large groups of persons and, ultimately, in respect of all UK residents, may not be sufficiently targeted at addressing the statutory aims set out in clause 1(3) to ensure proportionate interference with Article 8 rights**. **We draw these matters to the attention of both Houses.**

Entry on the Register of Information

1.14 Information may be entered onto the Register either voluntarily under clause 2(1); or where it is "otherwise available" to be recorded (clause 2(4)); or as a consequence of application for a document designated by the Home Secretary under clause 4; or following an order of the Home Secretary making entry on the Register compulsory under clause 6. Where entry on the Register is voluntary, Convention rights issues do not arise. The remaining means for entry onto the Register are considered below.

Information "Otherwise available"

1.15 Clause 2(4) of the Bill allows for information to be entered on the Register where it is "otherwise available to be recorded". The Home Secretary confirmed to us that this would allow for information to be recorded on the Register, whether or not an individual has applied to be or is entitled to be entered in it, if information capable of being recorded in an entry is otherwise available to be recorded.

1.16 The Government suggest that information entered under clause 2(4) would include information relating to failed asylum seekers or others about to be deported (to forestall future attempts to enter the UK) or individuals from outside the UK who are issued with a biometric visa on entry. Information on persons who were either not entitled to register, or had not yet done so, could also be recorded without their consent for national security reasons.

1.17 We do not agree with the Government's view that adding information already held elsewhere by Government to the Register would not engage Article 8 rights. In our view, the transfer of personal information to the Register without consent, to form part of a system of centralised data retention and identity checks, for the particular purposes served by the Register, does engage Article 8.

1.18 The Government have pointed out that the Data Protection Act requirements of notification will also apply to

the ID cards scheme, so that "wherever practicable individuals will be notified that information is to be recorded on the National Identity Register". **We welcome this clarification, and recognise that notification of an individual's entry on to the Register assists in ensuring that the interference with Article 8 rights is in accordance with law as required by Article 8.2**. We note, however, that it is envisaged that some persons will be entered on the Register without their knowledge, and that, where an individual's information is otherwise available in terms of clause 2(4), then entry on the Register is by way of compulsion, even under a nominally voluntary scheme. We also note that the circumstances in which information may be transferred to the Register in this way are not limited on the face of the Bill, and are not confined to the circumstances detailed in the response of the Home Secretary and referred to above. **We draw this to the attention of both Houses.**

Designated Documents

1.19 Under clause 4 of the Bill, where a document (such as a passport) is designated by the Secretary of State, a person applying for that document must also apply to be entered on the Register. We noted, in our first report on the Bill, that this would in effect make registration compulsory, where a person was either required to hold a particular document (for example a residence permit) or where they found it in practice necessary to hold a document (for example a passport or driving licence). The Government response to our concerns on this point suggests that the phased introduction of registration, through designating documents such as passports, is largely for reasons of administrative convenience

1.20 The Home Secretary in his response stresses that the requirement to obtain an ID card in addition to a passport does not in itself constitute an interference with Article 8 rights. We agree that the requirement to hold an ID card does not in itself interfere with Article 8 rights. However, the requirement to record personal information on a centrally held database, as a result of the designation of documents, will amount to such an interference, and must therefore be justified as necessary and proportionate in pursuit of a legitimate aim.

1.21 We note that, under the designated documents scheme, the interference with privacy rights involved in entry on the Register is likely to depend on application for documents unrelated to the statutory aims, bearing no necessary relation, for example, to the prevention or detection of crime or the protection of national security. We are not convinced that such a scheme of registration would be sufficiently targeted to constitute a proportionate means of pursuing the legitimate aims of the Register,[18] or that relevant and sufficient reasons have been put forward to justify such a scheme. **We consider that the imposition of what is effectively compulsory registration of personal information, dependent on application for a designated document unrelated to one of the aims of the Bill, by order made under clause 4, gives rise to a risk of disproportionate interference with Article 8 rights.**

1.22 We also raised the concern that designation of certain documents, and the consequent inequalities in interference with private life, could amount to discrimination in breach of Article 14 read in conjunction with Article 8 ECHR. The Home Secretary in his response disputes the application of Article 14, pointing to the requirement that in order to amount to discrimination under Article 14, a difference in treatment must be on the basis of a personal characteristic.[19]

1.23 The requirement that differences of treatment, to fall within Article 14, should be on the basis of a personal status or characteristic, has not led to a restrictive application of Article 14 by the ECtHR, however. Article 14 has, for example, been found to be engaged in relation to differences of treatment dependent on freehold rather than leasehold property ownership;[20] on ownership of more rather than less than 20 hectares of land;[21] and on the basis of different military ranks.[22] In our view, therefore, the phased introduction of registration through designation of documents would need to ensure that any differences in the treatment of different groups were such as could be objectively and reasonably justified in light of the legitimate aims of the Bill. **We draw these concerns to the attention of both Houses.**

Entry on the Register by compulsion

1.24 Clause 6 of the Bill allows for a move to compulsory registration and ID cards, either for all, or for particular groups. Compulsion is to be provided for by ministerial order, subject to a "super-affirmative"[23] process of parliamentary authorisation under clause 7. As the Home Secretary notes in his response, the details of a move to compulsory registration and ID cards have yet to be settled. However, the Home Secretary confirms that, for example, non-EEA third country nationals might be required to register before other residents under clause 6.

1.25 In our first report on the Bill, we questioned whether a phased scheme of compulsion would be either a proportionate interference with private life (Article 8 ECHR) or non-discriminatory (Article 8 and Article 14 ECHR). A scheme which required only those under a particular age to register, for example, might be difficult to justify as sufficiently tailored to the statutory aims to amount to a proportionate interference with Article 8 rights.

1.26 The Government considers that any discrimination involved in the phased introduction of compulsory registration would be objectively justified, so that, for example, compulsory registration for certain non-nationals would be justified in the interests of enforcing effective immigration control, prohibitions on working and restricting access to public services.

1.27 For such compulsory registration to amount to a proportionate interference with Article 8 rights, it must be the least privacy intrusive measure available to support these aims. Given the amount of personal information which may be held on the Register, and the wide range of purposes for which it may be accessed, including in support of aims unrelated to immigration control, we consider that there is a risk that a measure applying compulsory registration to non-nationals only would be found to amount to a disproportionate interference with Article 8 rights. There is a similar risk that the intrusion on privacy rights would be found to be discriminatory in breach of Article 8 and Article 14.

1.28 In our view, clause 6 does not contain sufficient safeguards to ensure that regulations made under it, allowing for the introduction of compulsory entry on the Register, would comply with the Convention rights. **Given the potential gravity of the intrusions on privacy rights which may follow from compulsory entry on the Register, we consider that such safeguards should be set out on the face of primary legislation, rather than left to secondary legislation as is envisaged by the Bill. We draw these concerns to the attention of both Houses.**

Identity checks for benefits and public services

1.29 Where registration becomes compulsory, access to any public services, including those that are free of charge, and access to benefits, may, by way of regulations, be made conditional on production of an ID card.[24] For those who are not required to register, only access to services which are not free of charge may be made conditional on production of a card.[25] Under clause 17, where there is a requirement to produce an ID card, regulations may allow the public service provider to be provided with information from the Register, in order to verify registrable facts about the individual applying for the service.[26]

1.30 The Government distinguishes between a right of access to the Register, and a right to receive information from it, only the second of which is permitted by the Bill. The Home Secretary in his response states—

The information to be provided to a particular public service provider will depend on the nature of the service. It is not possible to set out the details of each potential case on the face of the Bill. Hence the extensive powers [to make regulations] in clause 17(2) and (3) and 41(6). The intention is to limit any information provided to that which is necessary in the particular case, for example, if a public service needs to confirm an individual's age or nationality, that information could be provided on the Register.

1.31 The Government also emphasises that, under clause 17(3) and 41(6), it is intended to establish a system of accreditation so that only those organisations agreeing to comply with a set of requirements will be provided with any information from the Register.

1.32 We welcome the Home Secretary's assurance that information provided under clause 17 would be limited to that which is necessary in the particular case. Such a limitation should support the proportionate disclosure of information in compliance with Article 8(2). We consider, however, that given the important privacy interests at stake, the principle that information may only be disclosed to the extent that it is relevant to a legitimate aim and necessary in the particular case, should be set out on the face of the Bill, rather than left to regulations.

1.33 As we noted in our previous report on the Bill, the scheme for authorisation provided for under clause 17(3) could provide an important safeguard for compliance with Article 8 rights. We expressed concern in that report that provision for a scheme of authorisation under clause 17(3) was enabling rather than mandatory. We retain our view, but welcome the Government's confirmation, in their response to us, that such a scheme will be put in place, and that authorisation under clause 17 would be conditional on maintaining standards in the protection and storage of information. **We draw these matters to the attention of both Houses.**

Verification of Identity

1.34 Clause 18 provides that where compulsory registration applies, then a person may be required to produce an ID card, or to give consent to a check against his or her entry on the Register, as a condition of doing any thing in relation to that person (clause 18(2)(c)). Such a condition may be imposed by any person either public or private. A check against the person's entry in the Register, under clause 14, may only be made with consent; however, there must be some concern that in certain cases this consent will be essentially involuntary or notional, where access to essential services, or entry into necessary contracts, may be dependent on consent to a check against the Register.

1.35 Safeguards on the disclosure of information under clause 14 are permitted but not required by clause 14(4), which allows for secondary legislation to impose restrictions on information that may be provided under clause 14, including restrictions to prevent the disclosure of irrelevant information.[27] The Government takes the view that, as an enabling measure, which seeks to provide flexibility in gradual development of the ID cards scheme, the Bill should not include such provisions on its face.[28] Given the serious interference with Article 8 rights permitted under clause 14, however, we consider that such flexibility is not warranted. In our view, Article 8 compliance could most effectively be ensured by provision in clause 14 for further constraints on the disclosure of information, including limiting the information that may be disclosed to that necessary for verification purposes.

1.36 In response to our concerns, the Secretary of State stressed that a system of authorisation, similar to that proposed under clause 17, will be established under clauses 14(6) and 41(6) for organisations to which information is to be provided. We welcome this assurance. In our view, however, the Bill should require rather than permit authorisation for an organisation to be provided with information on the Register, and it should also be a requirement on the face of the Bill that a check should only be authorised where relevant to and necessary for one of the statutory purposes. **We draw these matters to the attention of both Houses.**

Exchange of Information

1.37 Under clause 11, the Home Secretary,[29] or a designated documents authority,[30] may require information to be provided from specified bodies, including but not limited to public bodies, in order to confirm information which is entered or is about to be entered on the Register. It appears that the circumstances in which such information could be required would include circumstances where information relating to an individual would be gathered without their

knowledge or consent, and would therefore engage Article 8.

1.38 We asked the Home Secretary for clarification of the circumstances in which information could be required to be provided under clause 11. In reply, the Home Secretary stated that, where an application is made for entry on the Register, checks will be made against other databases, including those of the DVLA and the DWP, and birth, marriage and death records. The information sought will be confined to that necessary to confirm identity, and to protect against fraudulent applications. It is emphasised that "this data sharing to build up a biographical picture is … crucial in establishing that an application to register is genuine and thereby in maintaining the accuracy of the Register."

Disclosure of Information

1.39 In our first report on the Bill, we raised particular concerns about the potential for extensive disclosure of information under clauses 19-22 of the Bill. Under those provisions, the Home Secretary may disclose information from an individual's entry on the Register to a range of public authorities, some of which are specified in the Bill, and some of which are to be specified in regulations. The range of bodies to which information may be disclosed under clauses 19-21 may be further extended by way of regulations made under clause 22. It is envisaged that safeguards on authorisation will be set out in regulations under clause 23, including provision for authorisation by particular ranks in each organisation.

1.40 We expressed particular concern at the potential breach of Article 8 rights in the disclosure of Schedule 1 paragraph 9 information - information on previous checks against a person's entry in the Register. An amendment made to clause 22 of the Bill at Report stage in the House of Commons precludes disclosure of such information in regulations made under clause 22. A further amendment specifies that regulations under clause 22 may only permit disclosure of information from the Register to public authorities. **We welcome these amendments.** However, the scope of disclosure of information under the Bill remains very wide. Information from the Register, other than the record of previous checks, may be accessed by Government Departments, the police, Inland Revenue and Commissioners for Customs and Excise in relation to wide-ranging purposes (clause 19). Of particular concern are the following points.

- It remains the case, under clause 20(4), that Schedule 1 Paragraph 9 information regarding any person on the Register can be disclosed to persons other than UK public authorities, in relation to actual or potential proceedings, either in the UK or abroad, concerning serious crime.[31]
- Schedule 1 Paragraph 9 information in respect of any person on the Register may be disclosed to the police, Inland Revenue or Commissioners of Customs and Excise, or any Government Department in relation to the prevention or detection of serious crime. (clause 20(4)).
- Schedule 1 Paragraph 9 information regarding any person entered on the Register can be disclosed to the Intelligence Services, GCHQ, or the Serious Organised Crime Agency (clause 19(2)).
- Order-making powers under clause 22 permit the disclosure of personal information (excluding schedule 1 Paragraph 9 information), to any public authority.

1.41 The disclosure of personal data without consent engages Article 8 rights.[32] The wide scope of disclosure permitted under the Bill raises three concerns of Article 8 compliance: whether the provision for disclosure is sufficiently foreseeable in its application to be in accordance with law as required by Article 8(2); whether the disclosure of information permitted by the Bill would in every case pursue a legitimate aim under Article 8(2); and whether the provision for disclosure is sufficiently circumscribed, and subject to sufficient safeguards, to amount to a proportionate interference with Article 8 rights.

1.42 In response to the concerns raised in our first report on the Bill, the Government relies on the Human Rights Act

obligation of those applying the scheme to comply with Convention rights,[33] as well as the oversight of the National Identity Scheme Commissioner who will report annually on the way the scheme has operated in practice.[34]

1.43 Whilst we agree that the oversight of the National Identity Scheme Commissioner does provide a valuable safeguard, we note that the oversight of the Commissioner is *ex post facto* only. Moreover, we do not consider that reliance on the duty of the implementing authorities, to exercise privacy-intrusive powers in accordance with their obligations as public authorities under the Human Rights Act 1998, provides a satisfactory guarantee of Article 8 rights given the gravity of the intrusion into private life represented by the disclosure provisions under the Bill, and the lack of safeguards on the face of the Bill itself. **We draw this to the attention of both Houses.**

1.44 The Government envisages that procedures for authorisation of the disclosure of information will be set out in regulations under clause 23, including provision for authorisation by particular ranks in each organisation. In our view, such safeguards are an essential condition of Article 8 compliance. Whilst we welcome the Government's confirmation that a scheme of authorisation will be put in place, we consider that such authorisation should be required, rather than permitted, by the Bill.

1.45 These disclosures of information are not subject to any requirement that there be a prior assessment of relevance, necessity and proportionality prior to disclosure. **Given the importance of the privacy interests at stake, a requirement that information should be disclosed only to the extent necessary for the statutory purposes should in our view be contained on the face of the Bill.**

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3 Fifth Report of Session 2004-05, *Identity Cards Bill*, HL Paper 35, HC 823 Back

4 HL Bill 30. Clause and paragraph numbers in this report refer to the Bill and Explanatory Notes as amended in Committee in the Commons (Bill 49) Back

5 Appendix 1 Back

6 *Leander v Sweden* (1987) 9 EHRR 433 Back

7 "Information relating to private life" protected by Article 8 includes any information relating to an identified or identifiable individual, including the systematic collection and storage of information which is otherwise publicly available: *Amann v Switzerland* (2000) 30 EHRR 843; *Rotaru v Romania* (2000) 8 BHRC 43 Back

8 *Reyntjens v Belgium* App No 16810/90, where the Identity Card which the applicant was required to hold and carry contained only his name, sex, date and place of birth, current address, and the name of his spouse. Back

9 Appendix 1 Back

10 Section 6 HRA Back

11 Nineteenth Report of Session 2003-04, *Children Bill*, HL Paper 161, HC 537, para.109-111 Back

12 Clause 1(5) and Schedule 1 Back

13 *Friedl v Austria* (1996) 21 EHRR 83; *Amann v Switzerland* (2000) 30 EHRR 843; *Niemitz v Germany* (1993) 16 EHRR 97. As we have noted above, the ECtHR has held that "personal information" should be broadly construed, and should extend to processing of "any information relating to an identified or identifiable individual:" *Niemitz v Germany* (1993) 16 EHRR 97; *Halford v UK* (1997) 24EHRR 52. In *R (Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, a majority of the House of Lords held that the retention of fingerprints did not engage Article 8; however, it has been held that the taking and retention of photographs intended to identify an individual do engage Article 8 (*Friedl v Austria*, op cit) Back

14 *Leander v Sweden* (1987)9 EHRR 433; *Rotaru v Romania* (2000) BHRC 43 Back

15 Appendix 1 Back

16 ibid. Back

17 Clause 1(5)(h), Schedule 1, para. 9 Back

18 In *Murray v United Kingdom*,(1994) 19 EHRR 193, para. 93, for example, the finding that recording of personal details of persons arrested (but never convicted) under Northern Ireland anti-terrorism legislation was found to be justified as necessary in a democratic society in the interests of the prevention of crime, since the personal information retained was relevant to arrests and investigation of terrorist crime. Back

19 Citing *R (S and Marper) v Chief Constable of South Yorkshire* (2004) UKHL 39. See also *Kjeldson, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 Back

20 *James v UK* (1986) 8 EHRR 12 Back

21 *Chassagnou v France* (1999) 29 EHRR 615 Back

22 *Engel v Netherlands* (1976) 1 EHRR 647 Back

23 EN para. 50 Back

24 Clause 15 Back

25 Clause 15(2) Back

26 Clause 17(1) Back

27 EN para. 93 Back

28 Appendix 1 Back

29 Clause 11(1) Back

30 Clause 11(2) Back

31 Clauses 20(2) and (3) and sections 17 and 18 Anti-Terrorism Crime and Security Act 2001 Back

32 *Leander v Sweden* (1987) 9 EHRR 433 Back

33 Section 6 HRA Back

34 Clause 24 Back