

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's response to the Home Office Consultation on the Draft Identity Cards Bill**

**July 2004**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

[www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml](http://www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml)

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## **Introduction**

1. We are restricting our comments to the detail of the draft Identity Cards Bill. Our principled and practical concerns over a National Compulsory Identity scheme are in Liberty's response to the Home Office consultation 'Entitlement Cards and Identity Fraud'.

2. Our comments on the Bill should not be taken to imply that Liberty accepts that a National Identity Register is either desirable or justified. The Government has ignored the financial, constitutional and privacy implications of the Register and identity card scheme. The financial costs, both in set up and maintenance, will be huge. Any perceived benefit would not justify introduction as public funds could invariably be better spent elsewhere. The introduction of an identity card scheme will have far reaching implications for the relationship between the individual and the state. Profound privacy implications arise from both the Government's record in maintaining databases, and the lack of enforceable privacy rights in comparable EU countries that have identity cards. We contest the Home Secretary's assertion that black and minority ethnic groups support his proposal. Race groups we have liaised with are concerned both about the experience of minority ethnic groups in other countries with identity card schemes, and the implications of a scheme in Britain whilst stop and search powers are disproportionately used against members of ethnic minority communities.

3. None of the arguments for identity cards stand up to examination. The impact in fighting crime, benefit fraud, terrorism and combating illegal immigration will be negligible. Any benefits in accessing services could be matched through single purpose identifiers. We are asked 'why not have an identity card?' The more pertinent question is 'what justification is there for a card?' Comparative research shows that countries with identity card schemes suffer the same problems that we are told cards will combat.

4. In his evidence to the Home Affairs Select Committee<sup>1</sup> the Information Commissioner Richard Thomas described his ‘increasing alarm’ at the proposals. He went on to say, ‘this is beginning to represent a very significant sea change in the relationship between the state and every individual in this country’, a comment that one Committee member suggested, ‘should send bells ringing across the whole of the government machinery and certainly the Home Secretary’. We hope that the Government accepts there are diverse practical and principled concerns about a national identity scheme.

5. Much of the detail about the process which determines who will have to carry a card; who will have access to information; and how information may be passed on, is not included in the draft Bill. These key details have been reserved by the Home Secretary for secondary legislation. There are more than 20 such order making powers. The consultation document makes repeated reference to the need for affirmative resolution by both Houses of Parliament to extend any provisions in the Bill relating to compulsion, information recorded and sharing and so on. While this provides some check to the Government’s ability to extend the provisions in the Bill, the affirmative resolution procedure is a blunt tool for legislative scrutiny, as it does not allow amendment of a proposed regulation. To take an example: a regulation that proposes extending the data sharing ability to a wide range of public bodies will either stand or fall as a whole. Parliamentarians may agree with some, but not all, aspects of proposed regulation, but they will be unable to amend it. To enable full legislative scrutiny and parliamentary debate the power to amend regulations should be written onto the face of the Bill, whenever regulations deal with categories of persons or bodies.<sup>2</sup>

6. The Home Office has stated that compulsion will not occur until a number of criteria have been satisfied, and that this is not envisaged for several years. It is worth noting that there is nothing in the Bill to prevent immediate compulsion. Clause 7 requires compulsion to be approved by Parliament and lays down a number of

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<sup>1</sup> Evidence to Home Affairs Committee 8 June 2004

<sup>2</sup> As in (clause 7 (2) (c)) which creates an ability to amend when extending compulsion. The problem with regulation approval was apparent in the recent orders made under the Regulation of Investigatory Powers Act 2000 where list of bodies to be given access powers to communications data for example had to be all approved or none.

requirements, but the timeframe envisaged appears to be dictated by logistical factors and can, presumably, be brought forward.

7. Although the Bill is called the 'Draft Identity Card Bill' its primary purpose (and the subject of the bulk of clauses) is to create a National Identity Register. An identity card itself is a consequence of entry onto the register. Provisions about data sharing powers and the level of detail recorded relate to the Register. This underlines the distinction between the previous wartime national identity scheme and the current proposal. It also means that the identity card itself is less relevant to the debate. All provisions relating to identity cards could effectively be removed from the Bill without undermining its principal purpose.

### **The Bill**

8. Clause 1 creates the National Identity Register. Information that can be held is limited to the definition of 'registrable facts' contained in clause 1 (4). The consultation document states at 2.10 that registrable facts cannot be extended by regulation to cover categories not relating to identification, such as criminal convictions or medical records. Liberty disputes this assertion. The list of 'registrable facts' includes at 1 (4) (g), 'information about numbers allocated to him for identification purposes and about documents to which they relate'. As identification numbers of the Police National Computer and National DNA database, for example, are used to establish links to identifying information they could arguably be included. Similarly, we do not see how the categorisation of 'residential status previously held by him' as a registrable fact (clause 1(4) (f)) is relevant as an identifier. We wonder how information about someone's past residential or immigration status could be regarded as limited to 'identifying information'.

9. Even if such information could not be added by regulation it is misleading to imply some sort of bar preventing addition to the list by subsequent primary legislation. We have recently seen provisions for data retention contained in anti terrorism legislation<sup>3</sup> and proposals for detention of terrorism suspects contained in an

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<sup>3</sup> The Anti Terrorism Crime and Security Act 2001

asylum bill<sup>4</sup>. It is easy to envisage extension proposals arising in a future criminal justice bill. During the recent investigation into the Soham murders, the Bichard inquiry looked into ways of ensuring that those who were unsuitable were not able to work with children or vulnerable people. Liberty agrees with the final recommendation, that there be a positive vetting process and a register of those suitable to work with children. However, had an identity card been in place at the time it is likely that there would have been suggestions for ‘soft’ non-conviction information to be held on identity cards. We make this point not to consider the desirability of doing so but to demonstrate how once a card is in place it is inevitable that uses develop beyond the initial parameters. In the early 1950s a government committee was set up to look at the use of the Second World War identity card. When introduced it had three purposes: conscription; national security; and rationing. By 1950, the number of uses had increased to 39 stated purposes.

10. Although the registration scheme is presented as being initially voluntary, the impact of clause 5 is that in many cases it will not be. Clause 5(2) requires that an application for any ‘designated’ document must be accompanied by an application for entry onto the register. We imagine designated documents will be primarily passports and driving licences. However, as clause 4 allows the Secretary of State to determine by regulation exactly which documents will be designated, there is every chance that this will be an extensive list to ensure compulsion at an early stage. This is not exactly disingenuous, the Government having clearly stated its intention to introduce a compulsory card. However, it means that many of those who do not intend to apply for a card while it is still in the ‘voluntary’ stage will find it anything but voluntary.

11. Liberty has grave concerns about the twin track voluntary and compulsory system that will be set up through the selective compellability powers granted to the Secretary of State under clause 6. It is likely that the Home Office intends that non-EU nationals will be compelled before British nationals: this is clear from the document that accompanied the Home Secretary’s launch of the national identity cards scheme in November 2003, ‘Identity Cards: The Next Steps’.<sup>5</sup> This raises race

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<sup>4</sup> Asylum and Immigration (Treatment of Claimants etc) Bill

<sup>5</sup> Cm 6020. At page 5 it is stated that the government will introduce “*mandatory* biometric identity documents for foreign nationals coming to stay in the UK for longer than 3 months” (Liberty’s

relations issues. For example, those who have to make a decision as to whether or not they are able to require production of a card under clause 19 are likely to do so on the basis that they have been compelled under clause 6. Therefore they will need to ask those who look foreign. In particular they will ask those who are not white. The Government also proposes phasing in compulsory registration for UK nationals according to age.<sup>6</sup> There are logical reasons why the government would wish to do this. For example, there may be evidence that people above a certain age might be more resistant to voluntary registration. Similarly, they may be less likely to be ‘forced’ to register by applying for a driving licence or passport.<sup>7</sup>

12. Use of the compulsion power in clause 6 carries a greater burden on those compelled than simply the prospect of a £2,500 fine (repeated on each occasion on which notice to register is not complied with). Those compelled to register will be subject to the fine of £1,000 for failing to renew their identity cards on time. Similarly, requirements that free public services cannot be conditional upon evidence of registration (clause 15) and the bar on required production of identity cards (clause 19) do not apply to those compelled under clause 6. Initial distinctions between classes of people could be converted, through clause 6, to a permanent twin-track system. It follows, for example, that those who are compelled to register simply on the basis of their age will be permanently subject to the far harsher regime that is the consequence of compulsion. Similarly, were non-UK, non-EEA nationals or asylum seekers to be compelled to register they would remain permanently subject to this harsher regime, even if they subsequently become UK nationals. This is an arbitrary and discriminatory approach and one we believe would be open to challenge under the Human Rights Act 1998 (HRA).

13. While the Bill allows for a possible permanent twin-track system, however, its scheme also permits the eventual extension of compulsion under clause 6 to all categories of people. In fact, ‘Legislation on Identity Cards: A Consultation’ expressly anticipates this. It is suggested that compulsion could be rolled out by

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emphasis) during Stage 1 of the scheme’s roll-out, while the cards will remain voluntary for UK nationals. The document also suggests that EU nationals will be included during Stage 1, but this is an impossibility under EU law.

<sup>6</sup> See paragraph 2.54 of the consultation document

<sup>7</sup> And therefore be compelled to register under clause 4

“[requiring] all people within a particular age band to register and to set a clear timetable for doing so”.<sup>8</sup> This means that the group of people who benefit from the safeguards set out in clauses 15 and 19 and who avoid the harsh effects of clause 9 will be ever-dwindling, and possibly eventually non-existent. Clause 19(1)’s guarantee of a prohibition on the requirement to produce identity cards, for example, will be rendered nugatory as more bands of people are compelled to register under clause 6.<sup>9</sup>

14. The Government may not have intended their safeguards to gradually disappear during the roll out of the identity scheme, but this is the effect of the draft Bill. However, it is likely that the Government’s intention when compellability becomes universal<sup>10</sup> is that all UK citizens will need to produce their cards upon request and will need their cards for access to public services.

15. The consultation paper is at pains to stress that the £2,500 fine is a civil, rather than criminal, penalty.<sup>11</sup> However, for the purposes of Article 6 of the HRA (the right to a fair trial) the penalty might be considered criminal rather than civil regardless of the label attached by the Government. European Court of Human Rights jurisprudence has established that, “for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as ‘criminal’ from the point of view of the Convention, or that the offence made the person liable to a sanction, which, by its nature and degree of severity, belongs in general to the ‘criminal’ sphere”.<sup>12</sup> It is worth remembering that clause 6 will apply not only to the person who absolutely refuses to have an identity card but also to anyone who does not take the chance to apply when the voluntary window of opportunity is open to them.<sup>13</sup> Clause 6 may also apply to individuals who have already volunteered but fall into a designated class, e.g. based on age or status. We believe that the Government should

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<sup>8</sup> Paragraph 2.54 of the consultation document.

<sup>9</sup> This is because Clause 19(2)(c) expressly excludes individuals subject to compulsion under Clause 6 from the protection set out in Clause 19.

<sup>10</sup> When everyone, whether they have volunteered for registration or been forced to register through e.g. passport application also comes under clause 6 by virtue of age compulsion (if that is the method used)

<sup>11</sup> See paragraph 2.55 and 2.56 of the consultation Document

<sup>12</sup> *Ezeh & Connors v UK* (Application Numbers 39665/98 and 40086/98)

<sup>13</sup> If indeed there ever is one. There is nothing in the bill to stop immediate compellability for whoever the home secretary feel should be made to carry a card immediately.

reconsider the introduction of such a harsh an arbitrary penalty system for all those compelled under clause 6 (a category which may eventually cover all individuals within the UK).

16. If the Home Secretary requires it, those required to be issued with identity cards can include anyone entering the UK. Under clause 8 (4) a card may be issued to anyone not normally required to carry a card but about whom prescribed registrable facts have been entered on the Register. These facts, such as name, address and so on, will be required from all those passing through customs. Under clause 2 (2) all those of a prescribed description proposing to enter the UK are entitled to be entered on the Register. The consequence of these two clauses is that the Secretary of State may pass regulations requiring non-nationals who are not applying for immigration or refugee status to have identity cards.

17. Clauses 11-13 relate to maintaining the accuracy of the Register. This is largely achieved through obligations on individuals to notify of changes in relevant information. It does not, however, create any obligation to audit the information contained on the Register. The Government has a poor record on accuracy of information held on databases, demonstrated most recently by the Criminal Records Bureau, which was shown to hold numerous inaccurate details of convictions. Whilst inaccurate information in the CRB can be discovered through the issuing of a Criminal Conviction Certificate, inaccuracies on the National Identity Register could remain undetected indefinitely. In addition to the obligations on individuals, Liberty believes a duty to ensure entries are accurate should be written onto the face on the Bill. This could be achieved by requiring details of the entry to be sent to those on the Register on an annual or bi-annual basis. While we maintain our opposition to the creation of a National Identity Register, if there is to be one it should be as accurate as possible. Self-verification is the best way to ensure this.

18. Clause 12 places an obligation upon all those on the Register to inform the Secretary of State of any relevant change of circumstance affecting an entry on the register. A failure to do so can result in a fine of £1,000. Whilst some details will remain relatively static, others, such as address, can change quite frequently. This could place a considerable burden on those who live in insecure, or simply frequently

changing, accommodation. As the Secretary of State can also require a fee to be paid for any modification to an entry on the Register (clause 37 (b)) the potential cost of the identity card to those who move house frequently (and who may be least able to afford such cost) is considerable.

19. Liberty is very concerned that regulations can require that failure to notify the Secretary of State that an identity card has been lost, stolen or damaged will be a criminal offence. This is wholly disproportionate and could criminalise a lack of awareness of a third party's actions. It is quite conceivable that the holder may not be aware of something 'in or on it having become unreadable or otherwise unusable' (clause 13 (9) (c)). Whether or not a prosecution occurs, it cannot be right that a person has committed an offence if their card is damaged even if they are unaware of the fact. At the very least a defence should be written into the Bill that the holder was unaware of the damage, or had other reasonable excuse, as otherwise the offence is strict liability. Equally, we are extremely concerned that someone who has their identity card stolen could themselves be criminalised as a consequence of not reporting the fact. In addition, an individual who mislays their card may wish to confirm that it has been 'lost' before reporting it, particularly given the financial implications of getting a new card; such a delay could be criminalised under clause 13.

20. Clause 15 ensures that provision of free public services (such as NHS treatment) cannot be conditional upon evidence of registration.<sup>14</sup> Similarly clause 19 creates a prohibition on a requirement to produce identity cards. However, both clause 15 and 19 contain exemptions (i.e. allowing refusal of services or requiring production of a card) where a person has been compelled under clause 6. We imagine this is primarily intended to ensure foreign nations or refugees, for example, be required to carry a card. It will also mean that those UK citizens who are compelled by reason of age (as explained in paragraph 10 above) or other category (as explained in paragraph 13 above) could be required to carry cards to access services.

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<sup>14</sup> Although regulations can be made requiring evidence of registration for general provision of public services.

21. This has a number of implications. One possible practical effect would be that UK citizens who are compelled by reason of not having registered by the date when the Home Secretary determines that cards shall become compulsory can be required to produce cards while other citizens are not. We do not imagine that the Government intends to impose this two-tier system on British citizens. For clarity's sake this should be made explicit in the Bill. As mentioned previously, this will also have a race relations impact, as non-whites will be far more likely to fall into a compelled category than whites. Again, as set out in paragraph 13 above, depending on how regulations under clause 6 are phrased, this two-tier system may eventually become single-track. It is, however, unclear whether the Government's plans to eventually move to full compulsion will be carried out using clause 6 or a new mechanism.

22. We are also concerned about the implications for many employees working in public services who will be expected to make a decision about whether a person can be required to produce a card or whether services can be legitimately refused. They will effectively be policing the identity register. They will also face potential legal action against their employer if they make an incorrect judgment about a requirement to produce a card as clause 19 (3) creates a specific duty not to impose an improper condition remediable by injunction of financial relief. We have spoken to Union representatives who are extremely concerned about the obligations and duties this will place upon their members.

23. The Home Secretary reserves the power to make regulations authorising disclosure of information on the register, without consent, to the police that goes beyond national security or crime detection and prevention.<sup>15</sup> We appreciate that such an order will have to be approved by Parliament but, as mentioned earlier, are concerned that this does not allow a sufficient level of scrutiny. Exhaustive lists of purposes appropriate to the legitimate accessing and sharing of information are frequently contained in legislation.<sup>16</sup> It is far preferable that the purposes be written onto this Bill. This will allow certainty and proper debate.

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<sup>15</sup> Clause 20 (3). Access records under Paragraph 9 can only be obtained if connected to the detection or prevention of serious crime.

<sup>16</sup> For example, in the Schedules to the Data Protection Act 1998, as legitimate purposes under Article 8 of the Human Rights Act 1998 or in section 22 of RIPA 2000.

24. Power to disclose without consent is further extended, theoretically without limit, in clause 23. Regardless of the fact that approval is required for regulation we remain extremely concerned that the Home Secretary has effectively written himself a blank cheque. We find it difficult to imagine a situation where disclosure of information on the register under clause 23 could be justified. Clauses 20-22 are already extremely broad in scope and we wonder what extra powers of disclosure are envisaged. In particular, we wonder how likely it is that disclosure powers which go beyond those already contained in the Bill will not breach data protection requirements or fall foul of proportionality and legitimate purpose requirements contained in Article 8 of the HRA. If the Government has further disclosure provisions in mind they should be written into the Bill when published to allow full Parliamentary debate.

25. While we do not accept the creation of the Register is justified we are pleased to see that a National Identity Scheme Commissioner will be appointed under clause 25. However, the broad title is misleading as this role will be limited to reviewing and reporting to the Prime Minister on the exercise of one aspect of the national identity scheme only, the power to disclose without consent. Further, the Prime Minister has a broad power to suppress details (clause 26 (4) (d)), meaning that the manner of reporting is far from independent. Liberty believes that if the Commissioner is truly to be regarded as an Identity Scheme Commissioner, three key changes must be made. First, his remit should cover the Home Secretary's other powers. Second, he should also be able to report on register accuracy, the use of penalties and broader issues such as interaction with the Citizen Identification Project database. Finally, to ensure maximum independence, the Commissioner should report directly to Parliament.

26. Ideally the role of the Commissioner should extend to overseeing the operation of the registration and identification scheme as a whole. If it is envisaged that the Secretary of State will make repeated extensions to his powers through the passing of regulation it is important that the Commissioner is able to report on the use of such powers. This will allow Parliamentarians to assess whether further extensions are justified.

27. We have no comment on the range of offences relating to the possession of false identity documents or documents relating to others with the intent of using these to establish identity. However, we query whether the lesser offences of being in possession of identity documents that are false, improperly obtained or that relate to someone else are entirely necessary. If the document has been improperly obtained it is likely that an offence will also have been committed under clause 30 (providing false information). If the document belongs to someone else then we imagine an offence of handling stolen goods would have been committed. If the document has been found, but the person has not taken steps to return them to the owner (whether this would amount to a reasonable excuse is questionable) we do not think the criminal law is appropriate.

28. We have mentioned earlier that the consequential costs arising from the national identity scheme are likely to be considerable. Clause 37 envisages a wide range of situations, including issue, modification and application for disclosure, where fees may be charged. While arguments over the direct and indirect costs of the scheme are not within the scope of a submission on the structure of the Bill, it is telling that the Home Secretary envisages the necessity of frequent charging to balance against the high costs of setting up and maintaining the Register.

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