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Select Committee on the Constitution

5th Report of Session 2004-05

Identity Cards Bill

Report with Evidence

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Identity Cards Bill

INTRODUCTION

1. The Identity Cards Bill has already been scrutinised by two parliamentary Committees—pre-legislatively by the Home Affairs Select Committee of the House of Commons¹ and the substantive Bill by the Joint Committee on Human Rights (JCHR).²
2. It is not our purpose to duplicate that earlier work. Our terms of reference are “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. In scrutinising proposed legislation, our primary task is to ensure that the legislative process does not have inadvertent or ill-considered consequences for matters of constitutional significance.
3. Both supporters and critics of the Bill agree that it is, in essence, an enabling measure. Like many other framework or skeleton Bills, it confers numerous powers on the Secretary of State to make regulations to enable aspects of the scheme to come into operation. Ministers acknowledge that the ultimate aim of the scheme set out in the Bill is to make it compulsory for everyone to be included in the Register and to have an identity card at an indeterminate date in the future, perhaps not for two full Parliaments.
4. The constitutional significance of the Bill is that it adjusts the fundamental relationship between the individual and the State. Notwithstanding the merits or otherwise of the proposals, commentary on which is outside our remit, it is important to ensure that adequate safeguards are in place to protect individuals from excessive intrusion into their affairs by institutions of the State, or by others. In replying to the Government response to its 4th report, the JCHR has reiterated its concerns about the scale of the information required, adequate protection under Articles 8 and 14 of the European Convention on Human Rights, and safeguards over the information that might be disclosed³. Our own concerns are not founded on the Convention, but rather on the fact that 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. Such a scheme may have the benefits that are claimed for it, but the existence of this extensive new database in the hands of the State makes abuse of privacy possible. In the rest of this report, we identify ways in which our concerns may be assuaged.
5. The common thread in our suggestions is that Parliament should not leave a scheme of such significance and complexity to the Secretary of State alone to develop, bring into operation and maintain. The legislation should make it

¹ 4th Report, 2003-04, HC 130, vols I and II. The Government response can be found in Cm 6359 of October 2004.

² 5th Report, 2004-05, HL Paper 35/HC 283 and 8th Report, 2004-05, HL Paper 60/HC 388.

³ 8th Report, 2004-05, HL Paper 60/HC 388, pages 7-16.

clear that the information held on the Register is not the “property” of the Secretary of State, who would in practice be the Home Secretary. We consider that the role of the Home Secretary should be confined to overseeing the development of the scheme (including its financing), and that the Home Secretary’s primary task should be, subject to the approval of Parliament, to make the many regulations within which the Register will operate. We also advocate the creation of an advisory or consultative committee (or commission), and propose that the Bill be limited to what has been termed the voluntary phase of the scheme.

THE REGISTER

6. Notwithstanding the statement in clause 1(3) of the Bill that the primary statutory objective is to provide individuals with “a convenient method ... to prove registrable facts about themselves to others”, the Bill’s primary significance lies in the creation of a national scheme for registering the identities (and associated personal details) of all persons within the United Kingdom who are over 16, other than foreign nationals who are here for less than three months. The 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. It will be possible, once all the biometric information is recorded, for the authorities, by scanning anyone who is or should be on the register, to check their identity and access the information about them without recourse to the identity card itself.
7. The primary concern, therefore, is to ensure an adequate legal and constitutional infrastructure for the maintenance of a National Identity Register, with appropriate separation and limitation of powers. Clause 1(1) declares that “It shall be the duty of the Secretary of State to establish and maintain a register of individuals.” We do not believe that maintenance of the register should be a responsibility of the Secretary of State. It should, rather, be the responsibility of an independent registrar, with a duty to report directly to Parliament.
8. We understand that the Government’s intention is that the register should be maintained by an executive agency, reporting to the Secretary of State and with a remit entrusted to it by the Secretary of State. However, no reference to this intention appears in the Bill. In our view, the scale, complexity and sensitivity of the enterprise make it essential that Parliament should create a new entity (whether registrar, commissioner, commission or other agency), with the duty to maintain the Register in accordance with the primary legislation made by Parliament and any secondary legislation made by the Secretary of State. No exact precedent exists for a National Identity Register, but in the case of Customs and Excise and Inland Revenue, which have the status of “non-ministerial public departments” and possess much information relating to individuals and their activities, it has long been the rule that Treasury Ministers should not intervene concerning a tax-payer’s personal affairs: such a rule necessarily limits their access to such information. Comparison may be made with the Census Act 1920, which confers a duty on the Registrar-General to carry out the ten-yearly census in accordance with the Act, Orders in Council and regulations made by the Secretary of State. The Registrar-General (in Scotland, the Registrar-General

for Scotland) has statutory responsibility for registering births, marriages and deaths; and under the National Registration Act 1939, the Registrar-General was responsible for administering the scheme of identity cards used during and after the Second World War.

OVERSIGHT OF THE SCHEME

9. The Bill proposes, in clause 24(1), the creation of a National Identity Scheme Commissioner to supervise and oversee the operation of the scheme. The Commissioner is to hold office in accordance with the terms of his appointment, but the Bill does not provide for the independence of his office. Nor does the Commissioner have power under the Bill to receive complaints from individuals about the way in which the Secretary of State has handled their affairs. The Commissioner must make an annual report to the Secretary of State on his functions for laying before Parliament, although the Secretary of State may in the public interest exclude material from the copy of the report so laid (clause 25(4)). We believe this provision might be strengthened, to general advantage, in three ways. First, the Commissioner should be independent of the Secretary of State; second, his powers should be extended to include such matters as investigation of complaints; third, he should be able to report directly to Parliament.
10. We also suggest for consideration the creation of an expert advisory or consultative committee or commission to exercise informed judgment regarding development of the National Identity Scheme. The aim would be to provide a forum bringing together representatives from the police/intelligence community, statisticians and registration experts, and civil society generally (meaning groups concerned with civil liberties and privacy, racial and religious groups, corporate and individual users' interests, and perhaps the media). Such a forum would be particularly valuable in the "voluntary" phase of implementing the scheme, helping to ensure both its practicality and the adequate protection of individual liberties. It would help both to reflect and inform public opinion.

TIMING

11. As noted in paragraph 3 above, the long term objective of the scheme set out in the Bill is to make it compulsory for everyone to be included in the Register and to have an identity card. Ministers have made it clear⁴ that their intention is to secure legislative authority now for the ultimately mandatory goals of the scheme. But the scheme will inevitably take a long time to come fully into operation, and will be dependent on the "super-affirmative" procedure created by clause 7, involving a resolution of each House, following a period of more than 60 days during which a report explaining the draft order has been laid in Parliament. Such an order (or orders) could extend the obligation to apply to be entered on the Register to the entire population.
12. Such a procedure would not be necessary if the present Bill were limited to introducing the "voluntary" phase of the scheme, leaving its extension to the entire population to be authorised by further primary legislation in the light of experience gained. It should be noted that the technology envisaged by the scheme is not yet tried and tested, and that estimates of the cost and charges

⁴ See House of Commons, Standing Committee B, 3rd sitting, 20 January 2005, col 123.

to be made to individuals can only be speculative. Experience may lead to the need for significant alterations to the proposals. It is difficult to see the urgency that attaches now to having all the primary legislation in place for future stages of a project that must for the moment be indefinite. Since, as noted above, these measures reflect a significant change in the constitutional relationship between the State and the individual, we consider that the change to a universal and compulsory scheme should not be brought about by secondary legislation, even by a “super-affirmative” procedure. If the scope of the Bill were restricted in this way, the “super-affirmative” procedure proposed need not appear in the Bill; and further primary legislation would be necessary, reflecting the experience gained through the voluntary scheme, when the time comes to contemplate an all-embracing compulsory scheme.

13. We make this report for the information of the House in order to draw attention to matters of principle affecting principal parts of the constitution. We have not sought in this brief report to mention many aspects of the Bill that deserve to receive the close attention of the House on their merits.