An ID Database for post-referendum Scotland? A legal-contextual analysis.

To the surprise of many observers, the Scottish government announced in early 2015 plans for a Scottish National ID system, based on the existing health service database. The Scottish National Party (SNP), in power in Scotland since 2007, had previously strongly rejected similar plans for a national database for the whole of the UK due to privacy concerns. How can this change of policy be explained?

1 “Ye Hypocrites, are these your pranks”

In 2007, the Scottish National Party (SNP) won for the first time a majority in a Scottish parliamentary election. At that time, a Labour government in London was pursuing a national ID card project for the whole of the UK. The backbone of this scheme was going to be a centralised computer database, the National Identity Register (NIR). Biometric information in the form of fingerprint scans was to be linked to the register. The physical embodiment envisaged three types of identity cards:
- The National Identity Card, lilac and salmon in colour, for British citizens only
- The Identification Card, turquoise and green in colour for EU citizens living in the UK
- The Identity Card for Foreign Nationals, blue and pink for immigrants from non-EU/EEA countries

Refusal to register was to carry a fine, as was failure to alert the authorities that a card had been lost, or that details in the register had changed.

In 2009, the Scottish Government confirmed Scotland’s opposition to ID cards in a letter from Minister for Community Safety Fergus Ewing to the UK Government:

“The Scottish Government continues to be completely opposed to the National Identity Scheme, and the Scottish Parliament recently supported a call for the UK Government to cancel its plans for the National Identity Scheme. [...] There is little tangible evidence to suggest ID cards will deliver any of the benefits Westminster claims: it is far from certain they will do anything to safeguard against crime and terrorism, and there are real concerns that the cards and the identity database could increase the risk of fraud, not reduce it.”

Opposition against this card scheme was widespread, and after Labour lost the 2010 national election, it was scrapped by the Conservative-LibDem coalition.

In December 2014, the Scottish SNP-led government, re-elected with a much increased majority in the 2011 Scottish elections, published a “minor” consultation on the “proposed amendments to the National Health Service Central Register (Scotland) Regulations 2006”. The proposal, if implemented, will transform the Scottish National Health Service (NHS) register (NHSCR) into a full-scale population register accessible to over 120 organisations. It will create a unique and persistent identifier that facilitates data sharing across agencies, while at the same time increasing the reach of the database and also the type of information that it contains. According to several commentators, it will create what the SNP in Scotland and Westminster had opposed in 2009: a National ID database.

Importantly, the Information Commissioner’s Office warned that the proposal, which lacks a Privacy Impact Assessment, risked breaching data protection laws and privacy standards. It also echoed the concern that the “creeping use of such identifiers” would eventually lead to a national ID card, introduced in circumvention of the democratic process:

“If we are to have a national identity number this should be the subject of proper debate and be accompanied by suitable safeguards. It should not just happen by default.”

The proposed changes in a nutshell:

At present, only the National Health Service and some local authorities can access the NHSCR for the purpose of identifying citizens. In the future, it will provide services to 120 organisations, including police, prisons, universities and some publicly owned companies such as Glasgow Airport, Quality Meat Scotland, VisitScotland and the Bòrd na Gàidhlig.

At present, only around 30% of citizens have their addresses on the NHSCR. The aim is to increase this to 100%, partly by da-

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3 See e.g. https://scotland.openrightsgroup.org/campaigns/stop-scottish-id-database; http://www.politics.co.uk/comment-analysis/2015/02/10/comment-buried-in-a-minor-consultation-scotland-s-id-cards-p.

ta sharing and matching between the register and its new users, partly by merging it with the Community Health Index Postcode (CHIP). At present, postcode data is only provided consensually, under the new system, this consensual model would shift towards mandatory registration.

The proposal states three general aims:

1) to increase data quality
   This would be at the expense of the consensus model which is a main reason for poor or incomplete data.

2) to extend the ability to access online services using Myaccount to a wider range of public services
   The new extended system will act as e-identity provider for Myaccount, the online system for the delivery of public service in Scotland. National Records of Scotland, as administrators of the NHSCR will acquire a critical role as an identity provider.

3) to assist with the tracing of certain persons
   Explicitly named are children at risk (e.g. children missing within the education system) and foreign individuals with outstanding debts with the NHS. No more specifics are given – one of the key complaints by the Information Commissioner’s Office, since some of these functions are already covered elsewhere, and without further specification could result in tracing citizens who for good and legal reasons do not want to be found.

Finally:

4) to enable the identification of Scottish tax payers to ensure the accurate allocation of tax receipts associated with the Scottish Rate of Income Tax to Scotland
   To understand exactly what these changes to the NHSCR amount to and if the charge of hypocrisy is merited, we need first to understand what the NHSCR is – and for this, a historical analysis of the origins of the database and the discussion surrounding it will be needed.

1.1 “See the front o’ battle lour!”

The NHSCR is an electronic database held and maintained by the National Records Office (NRO). It contains basic demographic details of everyone born or deceased in Scotland, or who was at some point registered with a General Medical Practitioner (GP) here. In modern times, its primary purpose is to facilitate the movement of medical patient records between Health Boards both within Scotland, and between Scotland and the rest of the UK. Its earlier history though gives us a rich case study in the problems of national ID systems.

The NHSCR grew out of a census held in the UK in 1939 as part of the effort to put the UK on war footing. An example of wartime emergency legislation, the National Registration Act 1939 paved the way to a national census (or “enumeration” as it was called in law). As part of the census, every person received a unique “civil registration number” (based on their address on enumeration night, and later on the birth register). This prepared the ground for issuing the National Identity Card, issuing food ration books, and identifying eligible adults for conscription.5 It also was used to identify children for evacuation purposes, which made the address an essential part of the information. Other data collected were names, gender, age, occupation, marital status and membership in the armed forces.

Most of these purposes became obsolete after the war had ended, though rationing continued for a few years. Introduced as emergency legislation with a sunset clause, the law that had enabled the census nonetheless proved remarkably difficult to get rid of. In 1946, Parliament passed the first of what would become a series of “Emergency Laws (Transitional Provisions) Acts”, which perpetuated several wartime laws, before becoming ultimately repealed in the 1956 Emergency Laws (Repeal) Act. The universally unpopular ID card system did not survive quite as long. It had been a controversial piece of legislation even under the tense conditions of 1939. The speeches of two Members of Parliament (MPs) at the time are particularly insightful. The Labour MP for the constituency of Farnworth, Georg Tomlinson, who had been elected in a by election just the previous year, said:

“It may be that there is a necessity for compiling a register, but here you have the possibility of people being stopped and asked whether they have or have not lost their cards. You may challenge a dozen people and you find one who has committed an offence. It will not help a scrap to win the war, but there is the possibility of penalising somebody who is perfectly innocent because we have passed a law for another purpose entirely.”

Here we find two ideas that had a lasting impact. First, Tomlinson anticipated what would later become, under Data Protection law, the purpose specification principle, but also anticipating that once data was collected, “mission creep” was all but inevitable. Second, we find a separation between the legal requirement to carry a physical Identity Card and the database that underpins such a card. It is only the former, not the latter that is seen problematic. This attitude would remain a defining feature of public debate on identity cards and identity registers up to the present day. Back in 1939, John Tinker MP expressed the concerns thus:

“We do not want to be stopped in the street by any person anywhere and to be forced to produce a card. If that kind of thing begins, we shall be afraid of people meeting us and asking for our cards. One thing that we do respect in this country is our freedom from being challenged on every occasion to produce something to prove that we are certain persons.”

The requirement to carry a physical ID card became subject of a criminal trial in 1950, when Clarence Henry Willcock became the last person in the UK to be prosecuted under the war time act. He had been challenged by a police constable of the name Harold Muckle to present his identity card at a police station within 48 hours. Willcock refused as a matter of principle, saying: “I am a Liberal and I am against this sort of thing”. During his subsequent trial, he argued that as the stated purpose of ID cards had lapsed with the end of the war, citizens were under no obligation to produce them. This was to no avail, and he was convicted and charged the princely sum of 10 shillings, approximately £11 in today’s money.

In Willcock v Muckle [1951] 2 ALL ER 367, the Court of Appeal upheld the conviction, but Lord Goddard, the then Lord Chief Justice of England and Wales, showed strong sympathy for the defence:

“This Act was passed for security purposes, and not for the purposes for which, apparently, it is now sought to be used. To use

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6 http://hansard.millbanksystems.com/commons/1939/sep/05/national-registration-bill

7 http://hansard.millbanksystems.com/commons/1939/sep/05/national-registration-bill