



Irish Council for
Civil Liberties

**Submission to Joint Committee on Employment Affairs and Social Protection
The Public Services Card
6 February 2018**

Introduction

The Irish Council for Civil Liberties (ICCL) thanks the Committee for the opportunity to make submissions on the Public Services Card. The ICCL is gravely concerned about Ireland's Public Services Card including the related biometric database and the Single Customer View database (together, the PSC). We assert that the PSC should not be continued in its current form given that:

- (a) its legislative basis is unclear;
- (b) it appears not to be a necessary or proportionate system for achieving the aim being pursued; and
- (c) there is no dedicated independent mechanism tasked with overseeing the PSC beyond the Data Protection Commissioner with its broad function of overseeing compliance with data protection law in general.

We acknowledge that the right to privacy under the Irish Constitution and European and international human rights laws is not absolute, and that the State may interfere with personal privacy in certain circumstances in the public interest. The key question regarding the Public Services Card is whether this systematic interference with personal privacy is in compliance with the basic requirements of the Constitution, EU law and ECHR law (we highlight these legal instruments in particular because their provisions are directly enforceable in the Irish courts). Under these legal instruments, State interferences with privacy may only occur where (a) clearly and explicitly authorised by law, (b) necessary to achieve a legitimate aim, and (c) proportionate to the aim being pursued, including that there is no less intrusive means of achieving such aim and that the safeguards in place strike an appropriate balance between promoting public interest objectives and safeguarding human rights.¹ In the case of the PSC, we are concerned that these basic legal requirements are not being met.

¹ See for example *Schrems v Data Protection Commissioner* [2014] IEHC 310; Murray J, *Review of the Law on the Retention of and Access to Communications Data* (April 2017); *Tele2 Sverige AB v Post-Och Telestyrelsen*; C-

1. What is the PSC?

The PSC is a new system for demonstrating proof of identity for a vast range of public services. The '[Comprehensive Guide to Safe Registration and the Public Services Card](#)' produced by the Department of Employment Affairs and Social Protection (DEASP) in October 2017 explains that the government no longer considers the PPS card or a driving license or passport to be sufficient proof of identity for accessing public services.² These forms of proof of identity are described by the DEASP publication as meeting only SAFE Level 1 requirements, whereas the PSC is stated to meet SAFE Level 2 requirements given its additional aspects. These additional aspects include that obtaining a PSC requires a biometric facial scan and that a person's information is stored in an electronic database accessible by numerous state bodies.³ The DEASP publication explains that it is now 'Government policy that SAFE 2 registration is required for access to all services that require substantial proof of a person's identity.'⁴

The fact that the PSC is now compulsory for numerous essential services, coupled with the storing of biometric data and the electronic sharing of the PSC's contents among an unidentifiable number of state bodies, means that it is a particularly intense interference with privacy rights. As we discuss below, the PSC also creates particular risks of abuse.

It is clear that the PSC is not optional. At our Public Meeting⁵ on 11 October 2017, we noted a prominent case where the Department of Social Protection suspended a woman's pension after she refused to register for the PSC. *Digital Rights Ireland*⁶ referred her to a solicitor and her pension has now been restored. Despite this, we are still hearing reports from the public regarding the refusal of state agencies to provide services without the PSC though without clear consistency in practice. Indeed, the PSC has been declared the only acceptable form of identity verification for services including social welfare payments, child benefit, school transport, treatment benefits, driver's license applications, age verification, school grant appeals, and online health and revenue portals. Furthermore, the Minister of State for Public Procurement, Open Government and eGovernment, Patrick O'Donovan TD, has announced his intention to initiate requirements for 100,000 students to obtain the PSC before they can apply for grants.⁷ The Government's eGovernment Strategy sets out an ambitious plan to

203/15 and C-698/15; *Digital Rights Ireland v The Minister for Communications, Marine and Natural Resources & Others* (Joined cases C-293/12 and C-594/12).

² Department of Employment Affairs and Social Protection, 'Comprehensive Guide to Safe Registration and the Public Services Card' (October 2017), https://www.welfare.ie/en/downloads/DEASP_Comprehensive_Guide_to_SAFE_Registration_and_the_PSC.pdf

³ The PSC requires users to provide a photo and a facial image biometric scan via the Standard Authentic Framework Environment registration system. This data is combined across agencies into the Single Customer View (SCV) database accessible by certain public agencies.

⁴ Ibid P19

⁵ Irish Council for Civil Liberties. (2018). *Open Meeting on Public Services Card*. [online] Available at: <https://www.iccl.ie/news/open-meeting-on-public-services-card/> [Accessed 4 Feb. 2018].

⁶ Edwards, E. (2017). 'Woman's pension to be restored in public services card row', *The Irish Times* [online] Available at: <https://www.irishtimes.com/news/ireland/irish-news/woman-s-pension-to-be-restored-in-public-services-card-row-1.3256965> [Accessed 4 Feb. 2018].

⁷ Brennan, M. (2017). 'Patrick O'Donovan to students: no PSC card, no grant aid', *Business Post* [online] Business Post. Available at: <https://www.businesspost.ie/news/patrick-odonovan-students-no-psc-card-no-grant-aid-404825> [Accessed 4 Feb. 2018].

extend the use of the PSC to a range of public services including passport applications and the Agfood.ie range of services.

We are concerned that the government has not acknowledged or been open with the public about the significance of its policy shift, and of the impact on people's privacy of its policy decision(s) to require the use of this biometric system of identity authorisation for such a broad range of public services and state bodies. We are further concerned at the possibility that the PSC will turn into a national identity card by default. At this point it would appear that there are approximately 50 agencies who currently have access to or are intended to have access to the database. The PSC system, in its current form as a system applying across a broad range of essential public services, has not been properly examined, scrutinised or debated by the Oireachtas. Nor has there been meaningful engagement with privacy stakeholders and relevant experts in this area.

2. The legislative basis for the PSC is not clear and therefore not sufficient to protect the right to privacy

The legislation claimed to underpin the PSC system is almost impossible to navigate and therefore it has been extremely difficult for us to assess the extent to which the PSC is provided for in law. However, the ICCL is not convinced that there is legislative provision for all of the uses to which the PSC is being put. On the basis of our research so far, it is not clear to us that there is provision in the Social Welfare Consolidation Act 2005 (as amended) for access and contributions by numerous agencies to one database (Single Customer View) which includes personal data of the type retained within the PSC system. Nor is it clear that there are prescribed safeguards in law regarding how the data in the PSC database, and in the biometric database, is to be handled by all state bodies that have access to it.

Apart from the technical question of whether there is some legislative basis for the PSC, an equally important point is that the bits of legislation that the government argues underpin the PSC are not clear and accessible, and as a result they have not led to or enabled public debate or meaningful public consultation regarding the PSC. We echo the Data Protection Commissioner's concern – which she stated in August 2017 – that 'transparency to the public on the underpinning legislative provisions, what data is being collected, for what purpose, and with whom data may be shared and for what purpose, needs to be adequately addressed'.⁸

The legislative provisions that the government claims to underpin the entire PSC system have been introduced mostly by small amendments over many years, which are not available online in consolidated form. The DEASP's explanatory document published in October 2017 states that 24 provisions of the Social Welfare Consolidation Act 2005 (as amended) provide the legislative underpinning for the PSC. It is impossible to see clearly what these provisions are and how they work because 20 of these provisions have been inserted by amendments

⁸ Data Protection Commissioner, Statement on the Public Services Card (30 August 2017), <https://www.dataprotection.ie/docs/EN/30-08-2017-Data-Protection-Commissioners-Statement-on-the-Public-Services-Card/m/1651.htm>

to the 2005 Act by way of five different Acts,⁹ and there is no version of the current, up-to-date, amended 2005 Social Welfare Consolidation Act available publicly online.

A person who wishes to understand what the 2005 Act currently states must patch together, one by one, the amendments that have been made by subsequent Acts. By way of illustrating the difficulty of this task:

- Sections 241 and 242 of the 2005 Act, upon which the government relies, have been amended 31 times between them.
- Section 247 of the 2005 Act has been amended 35 times.
- Section 263 of the 2005 Act has been amended 8 times.

In October 2017 it was reported that the Data Protection Commissioner (DPC) had decided to open a formal investigation into the lawfulness of the PSC.¹⁰ The DPC highlighted issues that are not yet resolved, including ‘biometric data processing and governance and data issues associated with the interplay between the Public Services Card, Public Service Identity set, MyGovID, Single Customer View and Infosys [information system]’.¹¹

It is a basic requirement of EU law and the European Convention on Human Rights (ECHR) that state interferences with privacy must have a legal basis – and this means not only that a law exists to authorise the interference but also that the law is **accessible and precise**. In the 1979 case of *Sunday Times v UK (No 1)* the European Court of Human Rights stated that in order for an interference to be in accordance with law:

the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct...¹²

In the 2008 case of *S and Marper v UK*, which concerned the storage of biometric data, the European Court of Human Rights held that in order for the interference with privacy to meet the requirement of being ‘in accordance with law’:

it is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.¹³

⁹ Social Welfare and Pensions Act 2010, Social Welfare and Pensions Act 2011, Social Welfare and Pensions Act 2012, Social Welfare and Pensions (Miscellaneous Provisions) Act 2013, Social Welfare and Pensions Act 2014.

¹⁰ See Elaine Edwards, ‘Data watchdog to open investigation into public services card’ *The Irish Times* (20 October 2017), <https://www.irishtimes.com/news/ireland/irish-news/data-watchdog-to-open-investigation-into-public-services-card-1.3263567>

¹¹ *ibid.*

¹² *Sunday Times v UK (No 1)* A 30 (1979)

¹³ *S and Marper v United Kingdom* (2009) 48 EHRR 50 para 99.

3. The PSC is not necessary and proportionate

The ICCL is also concerned that the PSC breaches the requirement under EU law, ECHR law and the Irish Constitution that interferences with privacy must be considered by the State to be both necessary to achieve a legitimate aim, and proportionate to the aim being pursued.

Whether the interference is necessary and proportionate is a balancing assessment, which must consider (among other things) whether there are less intrusive means by which the State could achieve its aim, whether there are sufficient safeguards in place to prevent abuse, and whether the State's actions are justified in light of the intensity of the interference with privacy. The fact that the Oireachtas and the public have not properly assessed the necessity and proportionality of the interference with privacy that the PSC represents is a key reason why the ICCL believes the PSC should not be continued in its current form.

The ICCL is not convinced that the PSC is **necessary to achieve a legitimate aim**. Alternative forms of identification, including passports, are available and have up to now been sufficient for the purposes of accessing public services. The cards do not appear to be financially necessary. While the Minister for Finance and Public Expenditure and Reform cites economic benefits to the PSC, the Office of the Comptroller and Auditor General observes that no business case has been made for this regime and that a comprehensive estimate of the total projected costs was not prepared at the outset.¹⁴ One example of extreme cost escalation includes the budget for the managed service provider element, which was increased by €2 million to €26.4 million in 2012 to take account of changes to the contract as a result of delays and card enhancements.

The ICCL also believes that the PSC is a **disproportionate** interference with privacy, in the sense that it goes beyond what is necessary and does not provide for adequate safeguards from abuse.

The PSC requires people in Ireland to link their personally identifiable information into one database shared by numerous agencies. Linking information this way creates a detailed account of each person's private behaviours in a manner that far exceeds the asserted goal of easy and convenient service access.

4. Risks and abuse and insufficient safeguards

There is no clearly defined independent supervisory authority which has ongoing and *dedicated and specific* responsibility for monitoring the management and security of stored data with the PSC, despite this being a growing norm of EU law where issues of surveillance and privacy are concerned. We recognise the general and extensive responsibilities of the Data Protection Commissioner in relation to privacy rights; however we believe that a specifically designated supervisory role is required here, with prescribed responsibilities by which security compliance is maintained for any retained data. These powers and

¹⁴ Auditor General Ireland. (2015). *Chapter 10: Roll-out of the Public Services Card*. [online] Available at: <http://www.audgen.gov.ie/documents/annualreports/2015/report/en/Chapter10.pdf> [Accessed 4 Feb. 2018].

specifications should be set out by the Oireachtas in order to allow a supervisory body to fully carry out its responsibilities. Clearly defined oversight could provide for the review of ethical problems in data management, including allegations that the Irish state is deliberately erasing the SCV database history showing who has accessed and changed your personal information.¹⁵

It is also crucial to note that a database with biometric features carries particularly serious security risks. Previous database breaches are not unusual in Ireland and so further breaches are conceivable. See for example the 350 data breaches in two years at PeoplePoint, the centre that provides HR and pensions administration services for 34,500 civil servants.¹⁶ The Irish electricity transmission system operator EirGrid was also hacked in 2017.¹⁷ See also the survey of 200 professionals carried out by the Irish Computer Society (ICS), which shows that 61% of organisations have had at least one data breach in the last year.¹⁸ When impermeable information like biometric scans are contained in a system, there is no undoing the breach once it occurs. India, home of the world's largest biometric identity card system has recently been hacked. Full administrative access is now reportedly being sold online for a mere €7 per person.¹⁹

5. The PSC risks undermining democracy

Finally, the ICCL wishes to make a general point about stated interferences with privacy and the protection and upholding of democracy. Democracy and the Rule of Law require equal treatment of individuals, state accountability and civic trust. Evidence from other countries demonstrates how the availability to the state of mass data collection technology presents the potential for targeting of minority and marginalised populations. In Hungary, the facial recognition software in some CCTV cameras links to photographs in police records. This threatens further racial profiling of Roma populations due to their over-representation in criminal files. In the United States, *Privacy Act* protections have been revoked for non-citizens, making it easier for agencies to share data on legal and undocumented immigrants with customs officials. Ireland has an opportunity to set a high democratic standard in privacy protections by opting not to store amalgamated data via the PSC in its current form. Ireland

¹⁵ Brennan, C. (2017). 'Woman has request to see changes made to her own data refused as database 'is blanked every two weeks''. [online] *The Journal*. Available at: <http://www.thejournal.ie/single-customer-view-deasp-3727634-Dec2017/> [Accessed 4 Feb. 2018].

¹⁶ Edwards, E. (2017). 'PeoplePoint audit shows 350 data breaches since 2014.' [online] *The Irish Times*. Available at: <https://www.irishtimes.com/news/ireland/irish-news/peoplepoint-audit-shows-350-data-breaches-since-2014-1.3053317> [Accessed 4 Feb. 2018].

¹⁷ McMahan, C. (2017). 'Exclusive: EirGrid targeted by 'state sponsored' hackers leaving networks exposed to 'devious attack'' [online] *The Independent*. Available at: <https://www.independent.ie/irish-news/news/exclusive-eirgrid-targeted-by-state-sponsored-hackers-leaving-networks-exposed-to-devious-attack-36003502.html> [Accessed 4 Feb. 2018].

¹⁸ Irish Computer Society (n.d.). *More than half of Irish Data Protection staff not prepared for GDPR, ICS survey concludes*. [online] Available at: <https://www.ics.ie/news/more-than-half-of-irish-data-protection-staff-not-prepared-for-gdpr-ics-survey-concludes> [Accessed 4 Feb. 2018].

¹⁹ Tribune Investigation – Security Breach (2018). 'Rs 500, 10 minutes, and you have access to billion Aadhaar details' [online] *The Tribune*. Available at: <http://www.tribuneindia.com/news/nation/rs-500-10-minutes-and-you-have-access-to-billion-aadhaar-details/523361.html> [Accessed 5 Feb. 2018]

is a leading technological centre and now can also lead by ensuring that citizens' digital privacy rights reflect basic democratic principles.

Conclusion

The government has failed to respond to the clear privacy concerns raised regarding the PSC and has instead invested further funds for promoting a project that is already over budget. We assert however that the PSC should not be continued in its current form given the privacy concerns it raises and the inadequate government response to these concerns. Indeed, we have reservations as to whether a data retention system of this type could ever be implemented in a safe and lawful way.

About us

Irish Council for Civil Liberties

Founded in 1976, the Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights organisation. It monitors, educates and campaigns in order to secure full enjoyment of rights for everyone. The ICCL have previously given submissions to the 2016 commissioned review of *Communications (Retention of Data) Bill 2009* and the Joint Committee on Justice and Equality *Communications (Retention of Data) Act Bill 2017*. They have also previously pursued privacy rights litigation with Liberty and others at the European Court of Human Rights in relation to the UK Ministry of Defence's system of surveillance in the case of *Liberty and others v The United Kingdom*.

ICCL is a member of the International Network of Civil Liberties Organizations (INCLO). INCLO is a network of 13 independent, national human rights organizations from different countries in the North and South that work together to promote fundamental rights and freedoms. Our advocacy includes pushing for higher standards of protection of informational privacy rights through transnational and international advocacy, while coordinating efforts at the national level against mass surveillance

Contact:

Elizabeth Farries
Information Rights Project Manager
Irish Council for Civil Liberties
International Network of Civil Liberties Organization
34, Usher's Quay, Dublin 8
elizabeth.farries@iccl.ie