



## Statewatch Analysis

### Rolling back the authoritarian state? An analysis of the coalition government's commitment to civil liberties

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## Part I: Introduction - the new government's commitment to civil liberties

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*We will be strong in defence of freedom. The Government believes that the British state has become too authoritarian, and that over the past decade it has abused and eroded fundamental human freedoms and historic civil liberties. We need to restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness.*<sup>1</sup>

This firm commitment to civil liberties made by the UK's new Conservative led coalition government has given civil liberty campaigners reason to be encouraged. It comes from the full-text of the coalition agreement, titled *The Coalition: our programme for government*, published by David Cameron and Nick Clegg on 20 May 2010. It is accompanied by a number of specific commitments to address the considerable damage done by New Labour's 13-year assault on civil liberties. The wording is vague, and a number of the outgoing government's most unsavoury enactments have not been adequately addressed, but crucially the new UK government has acknowledged that a problem exists.

Although both parties had been vocal on the subject in opposition, neither the Conservatives nor the Lib Dems made the restoration of civil liberties a cornerstone of their electoral campaign. But while other issues, such as the economy, electoral reform and European integration, garnered more column inches in the months leading up to the election, in the aftermath the issue of civil liberties emerged as a founding block on which a coalition between the two parties could be built. On key issues such as the DNA database, ID cards, the National Identity Register and the ContactPoint database, the two parties' manifestos are largely in agreement.<sup>2</sup> The rhetoric is also similar: the Lib Dems condemned Britain's "surveillance state" while the Conservatives promised to "scale back Labour's database state."<sup>3</sup> Further, both parties had committed to legislate substantially on these areas. The Lib Dems drafted a Freedom Bill, initially unveiled by Chris Huhne in February 2009, while days before the election David Cameron said that a "great repeal bill" would be the foundation of the next Queen's speech were his party to gain power.<sup>4</sup>

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<sup>1</sup> The Coalition: our programme for government, p. 11:  
[http://www.cabinetoffice.gov.uk/media/409088/pfg\\_coalition.pdf](http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf)

<sup>2</sup> The Labour government intended the ContactPoint database to hold information on every child in England.

<sup>3</sup> Liberal Democrat Manifesto 2010: [http://network.libdems.org.uk/manifesto2010/libdem\\_manifesto\\_2010.pdf](http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf)  
and Conservative Manifesto 2010:  
[http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010\\_lowres.pdf](http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf)

<sup>4</sup> The Times, 2.5.10: <http://www.timesonline.co.uk/tol/news/politics/article7114002.ece>

To be sure, fundamental ideological differences exist. The most obvious, and potentially divisive, is that the Conservatives pledged in their manifesto to repeal the UK's Human Rights Act (HRA) and replace it with a Bill of Rights, something the Lib Dems made clear they would fight tooth and nail to prevent. The seven-page document published by Cameron and Clegg on 12 May outlining the main policy agreements of the coalition government included a section on civil liberties but made no mention of the HRA. However, on 20 May, the full-text of the agreement was unveiled and included a commitment to establish a Commission to investigate the creation of a British Bill of Rights. It is one of 27 policy reviews provided for by the document, which has led to accusations that the new coalition is simply dodging policy areas on which they disagree. Cameron branded these criticisms "churlish" and said that "compromises have, of course, been made on both sides, but those compromises have strengthened, not weakened, the final result."<sup>5</sup>

It certainly appears that contentious issues have been put to one side and a pragmatic approach pursued which emphasises the "breadth of common ground" between the two parties. Thus, agreements on the most objectionable civil liberty infractions of the past 13 years have been reached swiftly, with more factious policy areas left to be resolved at a later date. Hugely important questions over the future of the HRA and the application of anti-terrorism legislation, such as control orders, loom large. There are also other dubious laws and databases that have not yet been addressed which this article will discuss. But for now the list of substantive measures contained in the civil liberties section of the coalition agreement makes pleasant reading to libertarians:

- *We will implement a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion*
- *We will introduce a Freedom Bill.*
- *We will scrap the ID card scheme, the National Identity register and the ContactPoint database, and halt the next generation of biometric passports.*
- *We will outlaw the finger-printing of children at school without parental permission.*
- *We will extend the scope of the Freedom of Information Act to provide greater transparency.*
- *We will adopt the protections of the Scottish model for the DNA database.*
- *We will protect historic freedoms through the defence of trial by jury.*
- *We will restore rights to non-violent protest.*

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<sup>5</sup> The Independent, 21.5.10: <http://www.independent.co.uk/news/uk/politics/tories-are-urged-to-get-used-to-compromise-as-coalition-unveils-policies-1978874.html>

- *We will review libel laws to protect freedom of speech.*
- *We will introduce safeguards against the misuse of anti-terrorism legislation.*
- *We will further regulate CCTV.*
- *We will end the storage of internet and email records without good reason.*
- *We will introduce a new mechanism to prevent the proliferation of unnecessary new criminal offences.*
- *We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties.<sup>6</sup>*

The wording of some of these points is vague and it remains to be seen what form they will take when the bill is drafted. But what is both surprising and encouraging is that the Conservatives appear to have made concessions to the Lib Dems by adopting the majority of the proposals set out in their manifesto and draft Freedom Bill. Writing in *The Observer*, Henry Porter suggests that “it is a rare stroke of luck for the interests of liberty that the coalition allows the prime minister, David Cameron, to embrace this Lib Dem policy with open arms and ignore the reservations of the law-and-order nuts on his right.”<sup>7</sup>

## Part II: The proposed measures

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### 1. *We will introduce a Freedom Bill.*

On 25 May 2010, the Queen’s speech confirmed that a “Freedom (Great Repeal) Bill” would be introduced as one of 22 new bills. The government said its purpose is to “roll back the State, reducing the weight of government imposition on citizens that has increased in recent years through legislation and centralised programmes.”<sup>8</sup>

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<sup>6</sup> The Coalition: our programme for government, p. 11:  
[http://www.cabinetoffice.gov.uk/media/409088/pfg\\_coalition.pdf](http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf)

<sup>7</sup> The Guardian, 16.5.10:  
<http://www.guardian.co.uk/commentisfree/2010/may/16/henry-porter-civil-liberties-coalition>

<sup>8</sup> <http://www.number10.gov.uk/queens-speech/2010/05/queens-speech-freedom-great-repeal-bill-50647>

Listed as “main elements of the Bill” are all of the civil liberty measures set out in the coalition agreement with the exception of their commitments on outlawing fingerprinting in schools without parental consent, abolishing the identity card scheme (this is covered by the *Identity Documents Bill*), scrapping biometric passports and establishing a commission to investigate the creation of a UK Bill of Rights.

The new government also expanded on what it believes “the main benefits of the bill would be”:

- *Restoring freedoms and civil liberties.*
- *Providing for greater accountability of the State to citizens.*
- *Reducing the burden of Government intrusion into the lives of individuals, by repealing unnecessary criminal laws.*
- *Strengthening the accountability of bodies receiving public funding in light of lessons learnt so far from the operation of the Freedom of Information Act.*
- *Introducing new legislation to restrict the scope of the DNA database and to give added protection to innocent people whose samples have been stored.*
- *Allowing members of the public to protest peacefully without fear of being criminalised.*
- *Ensuring anti-terrorism legislation strikes the right balance between protecting the public, strengthening social cohesion and protecting civil liberties.*
- *Protecting privacy by introducing new legislation to regulate the use of CCTV.*
- *Ensuring the storage of internet and email records is only done when there is good reason to do so.*

It is unclear when the bill will be drafted. The new Home Secretary, Theresa May, has said only that it will be introduced “before this parliamentary session is up.”<sup>9</sup>

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<sup>9</sup> The Guardian, 10.6.10:

<http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/10/stop-and-search-powers-abuse>

***2. We will scrap the ID card scheme, the National Identity register and the ContactPoint database, and halt the next generation of biometric passports.***

It comes as no surprise that identity cards and the National Identity Register (NIR) will be scrapped. Their abolition was a primary manifesto commitment for both the Conservatives and Lib Dems, both of whom had vehemently opposed the *Identity Cards Act 2006*. What is heartening, however, is that the new coalition government has pledged to cancel the introduction of second generation biometric passports even though only the Lib Dems were committed to doing so. Fingerprint records were due to be added to these “e-passports” from 2012.

Passports come under the “Royal Prerogative” and must be amended by an “Order in Council” agreed by the Privy Council (of which cabinet ministers automatically become members) in the name of the head of state, the Monarch. Under this arcane process, the Queen calls a meeting of the Privy Council, usually four or five cabinet ministers, at which they agree the matters before it without discussion. A decision to agree a new law then becomes an “Order in Council” and is subsequently laid before parliament in the form of a listing in the daily order paper. If MPs do not force a negative vote on the floor of the house - a move that is virtually unheard of - it automatically becomes law. Whether an “Order of Council” on second generation biometric passports has been agreed is unknown, and as such there is currently no discernable timescale for the scheme’s termination.

The abolition of identity cards and the NIR is more straightforward. They will be scrapped by the *Identity Documents Bill*, which was presented to parliament on 26 May 2010.<sup>10</sup> Its main elements are listed as:

- *The cancellation of all ID cards within one month of Royal Assent;*
- *Removal of the statutory requirement to issue ID Cards on Royal Assent;*
- *Cancellation of the National Identity Register.*
- *Destruction of all data held on the Register within one month of Royal Assent.*
- *Closing the Office of the Identity Commissioner.*
- *Re-enactment of certain necessary provisions of the 2006 Act including some criminal offences (possession or use of false identity documents) that are commonly used for identity documents other ID cards.*
- *No refunds to existing cardholders.*

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<sup>10</sup> See: <http://www.number10.gov.uk/queens-speech/2010/05/queens-speech-identity-documents-bill-50641>

On 27 May 2010, Theresa May said that identity cards would be abolished within 100 days. The NIR, which has drawn stinging criticism from civil liberty campaigners from its inception, would then be physically destroyed. In many ways publicity surrounding the introduction of identity cards served to mask the creation of the NIR: a massive and unprecedentedly comprehensive database. Labour intended it to hold at least fifty pieces of information on every adult in the UK, including biometric data such as fingerprints, facial images and retina scans. These identifiers would be permanently stored on the database, even after a person's death, and a wide range of government departments and agencies would have access to it.

Essentially, identity cards would simply be an extension of this database that you carry on your person. As would the new biometric passports because, as well as sharing an application process with identity cards, the government intended for passport data to also be stored on the NIR because "it will be far more cost effective and secure."<sup>11</sup> Identity cards, passports and the NIR formed Labour's "National Identity Scheme", the creation of which was readily justified by the need to keep up with other European countries who were adding to the number of biometric identifiers held in their citizens' passports. But while some EU member states are compelled to introduce additional biometrics by the Schengen Acquis, the UK opted-out of this requirement and thus has no legal obligation to follow suit.<sup>12</sup> Perhaps more importantly, no country is obliged to create centralised databases in which to store this data as the UK has done. Germany, for example, has categorically rejected the creation of a national register of fingerprints.

It remains to be seen how quickly and easily ID cards and passports can be disentangled from one another. The UK Identity and Passport Service may not only need a new name, but new legislation to dictate how it functions. At the very least it is likely to need significant restructuring. The new government's comprehensive overhaul of Labour policies in this field will fundamentally alter the way the agency functions and Phil Booth of NO2ID has been quick to warn that this will not be straightforward:

*Don't imagine for a moment that Whitehall will give up its pet projects, empires or agendas without a fight - battles for which we know it has been preparing for years. Nor should we expect the political, commercial and media proponents of database state initiatives to stand quietly by. The official obsession with identity and information-sharing, the very idea that "personal information is the lifeblood of government" still remains.<sup>13</sup>*

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<sup>11</sup> Commons Hansard written answers text, 6 April 2010:  
[http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100406/text/100406w0029.htm#column\\_1269W](http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100406/text/100406w0029.htm#column_1269W)

<sup>12</sup> See Statewatch analysis: UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law, June 2009:  
<http://www.statewatch.org/news/2009/jun/uk-ireland-analysis-no-4-lisbon-opt-outs.pdf>

<sup>13</sup> Email message to supporters, 14.5.10

By contrast, the Department for Education has confirmed that the abolition of the ContactPoint (CP) database, another manifesto commitment of both parties, will not require primary legislation.<sup>14</sup> We have been told that the appropriate changes will be made in “due course,” but no timetable for this has been established and no indication has yet been given as to what will replace it.

Created under the *Children Act 2004*, and launched in 2009, CP holds personal information on everyone under 18 years of age in England, and is fully operational despite being heavily criticised for routinely invading personal privacy and having insufficient security checks.<sup>15</sup> The database is currently accessible by roughly 390,000 teachers, police officers and social workers and is intended to improve child protection by making it easier for them to work as a team. But there is no way to ensure that the vast number of people with access to CP will utilise sensitive information held on the database appropriately, nor are effective mechanisms in place for identifying misuse. Critics have branded the database “a population-surveillance tool” which does nothing to protect children and argued that it is incompatible with both Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, and the UN Convention on the Rights of the Child.<sup>16</sup>

Together, the National Identity Scheme and the CP database would impose cradle to grave surveillance. Manifesto commitments have given the new government not only a clear political mandate to abolish these policies but a moral obligation to do so. If one were needed, an additional motivating factor is to save money: an estimated £86 million was to be spent on identity cards over the next four years, and £134 million on biometric passports.<sup>17</sup>

Significantly, a separate scheme run by the UK Border Agency which requires foreign nationals to apply for a biometric residence permit will continue to issue compulsory identity cards to some successful applicants. The system’s legal base is the *UK Borders Act 2007* and it does not use the NIR so will be unaffected by the demise of the National Identity Scheme. The Home Office said it intends to hold the biometric details of 90% of foreign nationals by 2015.<sup>18</sup> *Liberty* has warned of the potentially

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<sup>14</sup> Kable website, 26.5.10: <http://www.kable.co.uk/contactpoint-scrapping-dfe-education-lacks-date-26may10>

<sup>15</sup> For example see: The Guardian, 22.6.07: <http://www.guardian.co.uk/society/2007/jun/22/childrenservices.comment>

<sup>16</sup> The Guardian, 28.2.07: <http://www.guardian.co.uk/commentisfree/2007/feb/28/comment.children>

<sup>17</sup> The Times, 28.5.10: <http://www.timesonline.co.uk/tol/news/politics/article7138094.ece>

<sup>18</sup> The Independent, 26.9.08: <http://www.independent.co.uk/news/uk/home-news/first-sight-of-the-id-cards-that-will-soon-be-compulsory-942802.html>

divisive effect forcing identity cards on specific social groups could have, but the new government has given no indication that it will alter this policy.<sup>19</sup>

### **3. We will outlaw the finger-printing of children at school without parental permission.**

This is a Lib Dem manifesto commitment to help regulate the rapid growth of fingerprint identification systems in schools. By 2008 an estimated 3,500 schools had collected biometric data on as many as two million children.<sup>20</sup> In June 2010, figures disclosed under the *Freedom of Information Act* showed that roughly one in three secondary schools have fingerprinted their pupils.<sup>21</sup> Incredibly, many schools have accumulated this data without notifying parents and some have made participation in the scheme mandatory. There have even been reports of students who refuse to cooperate being threatened with expulsion.<sup>22</sup> Children's charities have argued that these systems make children feel like criminals and that schools are not secure enough environments to hold such sensitive personal data. Baroness Walmsley told the House of Lords that China has banned the practice for being "too intrusive and an infringement of children's rights."<sup>23</sup>

Despite these grave concerns, the Information Commissioner's Office surprisingly states: "There is nothing explicit in the [Data Protection] Act to require schools to seek consent from all parents before implementing a fingerprinting application."<sup>24</sup> The Labour government effectively dodged the issue and said that it was up to local education authorities to set policy in this area. Outlawing the practice will therefore require new legislation, but it is the only policy commitment listed in the civil liberties section of the coalition agreement that has not also been named as a "main element" of the *Freedom (Great Repeal) Bill*. Exactly what this means for the policy is unclear, but responsibility for its implementation will lie with the Department of Justice.

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<sup>19</sup> Liberty press release, 27.5.10: <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/27-05-10-id-cards-to-be-scraped-but-must-be-scraped-for-all.shtml>

<sup>20</sup> See: <http://www.leavethemkidsalone.com/>

<sup>21</sup> Daily Mail, 9.6.10: <http://www.mailonsunday.co.uk/news/article-1285305/One-schools-fingerprinting-pupils-Big-Brother-regime-sweeps-education-system.html>

<sup>22</sup> See: <http://www.leavethemkidsalone.com/excluded.htm>

<sup>23</sup> BBC website: [http://news.bbc.co.uk/1/hi/uk\\_politics/6468643.stm](http://news.bbc.co.uk/1/hi/uk_politics/6468643.stm) See also: Statewatch volume 16 no. 3 and volume 18 no. 2

<sup>24</sup> See: [http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/fingerprinting\\_fi nal\\_view\\_v1.11.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/fingerprinting_fi nal_view_v1.11.pdf)

#### ***4. We will extend the scope of the Freedom of Information Act to provide greater transparency.***

Both parties promised to strengthen the powers of the Information Commissioner in their manifestos. The post was created by the *Freedom of Information Act* which, although passed in 2000, only came into force in 2005. It replaced the post of Data Protection Commissioner with that of Information Commissioner. The Information Commissioner's Office, an independent authority of which the Ministry of Justice is its "sponsoring department", is responsible for overseeing the application of the Act.

The Lib Dems pledged to strengthen the Act arguing that too many freedom of information requests are refused, and that there are too many exemptions. In the draft of their Freedom Bill they proposed that the Information Commissioner be given greater powers to ensure that all data controllers, both in the public and private sector, are complying with the Act and punish those who are not.<sup>25</sup> This would mean giving the Commissioner the same power to inspect private companies as public bodies; a move the Conservatives support. The Lib Dems also proposed that many of the baseless blanket exemptions public bodies are afforded be removed.

The Lib Dems were also highly critical of Labour's use of the Act to avoid having to publish the minutes of cabinet meetings at which the 2003 invasion of Iraq was discussed.<sup>26</sup> Labour had argued that doing so would damage cabinet government and invoked section 53 of the Act to veto first the Information Commissioner's decision that the public interest should prevail, and later the Information Tribunal which upheld the Commissioner's decision. The Lib Dems branded this action "self-serving and wrong" arguing that "ministers are allowing themselves to be judge and jury in their own cause." They therefore pledged to scrap the government's right to veto in their draft Freedom Bill but this change has not been mooted recently and it is more likely that any reform of the *Freedom of Information Act* will focus primarily on the role of the Information Commissioner.

#### ***5. We will adopt the protections of the Scottish model for the DNA database.***

The UK Police National DNA Database is the largest in the world because, since 2004, anyone arrested in England and Wales for any "recordable offence" automatically has a DNA sample taken, regardless of whether charges are ever brought against them - a very low threshold. Any sample taken is then permanently stored in the database. In December 2008, the European Court of Human Rights (ECtHR) ruled that this practice breaches Article 8 of the European Convention on

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<sup>25</sup> The Freedom Bill, part 5 chapter 1 explanatory note:  
<http://freedom.libdems.org.uk/the-freedom-bill/17-strengthening-freedom-of-information>

<sup>26</sup> The Freedom Bill, part 5 chapter 2 explanatory note:  
<http://freedom.libdems.org.uk/the-freedom-bill/18-the-ministerial-veto>

Human Rights which covers the right of respect for private and family life. The UK government responded by introducing a complicated range of clauses in its *Crime and Security Bill* that reduced the length of time the records of innocent people would be held to six years. These changes, which did not adequately comply with the ECtHR's ruling, will not now be introduced.

In opposition, both the Lib Dems and Conservatives had been critical of the operational practices of the database. But while the Lib Dem manifesto is categorical in its assertions that the practice of adding innocent people to the database should be discontinued, and that those without a criminal record should be removed, the wording of the Conservative manifesto is less encouraging. It states: "...we will change the guidance to give people on the database who have been wrongly accused of a *minor crime* an *automatic right* to have their DNA withdrawn"<sup>27</sup> (emphasis added). The implication is that people will still have to request to be removed from the database, and there is leeway for the retention of DNA profiles of those accused - but not charged or convicted - of some crimes.

With the adoption of the Scottish model the Conservatives appear to have held sway on this issue. In Scotland police are not entitled to permanently store the DNA of everyone they arrest, but in specific circumstances, when an individual is accused of a violent or sexual crime, they can retain a sample for three years. Once this period has elapsed the police can then apply to a Sheriff to keep the individual on the database for a further two years. Although certainly less objectionable than the system of data retention currently in place in England and Wales, the Scottish model does not satisfy the Lib Dem commitment to not retain the DNA of innocent people. Campaigning organisations, such as *Genewatch*, have also highlighted the fact that under the Scottish model individuals convicted of minor offences still find themselves on the database for life.<sup>28</sup>

The current database has been criticised for its "function creep", lack of cost-effectiveness and over-representation of ethnic minorities and children. It is unclear if and how the new government will address these issues. They must also contend with a police culture that has become increasingly predicated on arrest-making as a means to acquire peoples' DNA samples.<sup>29</sup> Writing in *The Guardian*, Carole McCartney warned that the reform of legislation governing the DNA database will not be "quick and straightforward" and urged the government to demonstrate that "restoring trust in the governance of forensic bioinformation is high on its agenda, taking seriously the numerous reports by respected academics on the subject, and engaging properly in open-minded and comprehensive consultation."<sup>30</sup> For now we

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<sup>27</sup> Conservative Manifesto 2010, p 80:  
[http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010\\_lowres.pdf](http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf)

<sup>28</sup> See: <http://www.genewatch.org/sub-539489>

<sup>29</sup> See: Statewatch volume 19 no. 4

<sup>30</sup> The Guardian, 20.5.10:







































