



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

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.¹

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.² The rhetoric is also similar: the Lib Dems condemned Britain's "surveillance state" while the Conservatives promised to "scale back Labour's database state."³ 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.⁴

¹ The Coalition: our programme for government, p. 11:
http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

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

³ Liberal Democrat Manifesto 2010: http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf
and Conservative Manifesto 2010:
http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf

⁴ 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."⁵

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.*

⁵ 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.⁶*

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.”⁷

Part II: The proposed measures

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.”⁸

⁶ The Coalition: our programme for government, p. 11:
http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

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

⁸ <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.”⁹

⁹ 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 2010.¹⁰ 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.*

¹⁰ 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."¹¹ 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.¹² 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.¹³

¹¹ Commons Hansard written answers text, 6 April 2010:
http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100406/text/100406w0029.htm#column_1269W

¹² 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>

¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷

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 2015.¹⁸ *Liberty* has warned of the potentially

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

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

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

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

¹⁸ 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.¹⁹

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.²⁰ In June 2010, figures disclosed under the *Freedom of Information Act* showed that roughly one in three secondary schools have fingerprinted their pupils.²¹ 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.²² 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."²³

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."²⁴ 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.

¹⁹ 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>

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

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

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

²³ BBC website: http://news.bbc.co.uk/1/hi/uk_politics/6468643.stm See also: Statewatch volume 16 no. 3 and volume 18 no. 2

²⁴ See: 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.²⁵ 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.²⁶ 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

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

²⁶ 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"²⁷ (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.²⁸

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.²⁹ 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."³⁰ For now we

²⁷ Conservative Manifesto 2010, p 80:
http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf

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

²⁹ See: Statewatch volume 19 no. 4

³⁰ The Guardian, 20.5.10:

have been afforded scant detail. Will innocent people currently on the database have to apply to be removed or will this be done automatically? And what of the status of individuals arrested but not convicted of a “serious crime” within the last five years? The importance of these questions is magnified by the Prüm Treaty, incorporated into EU law in June 2007, which gives member states reciprocal access to each other’s national databases of DNA profiles, fingerprints and vehicle registrations.

In her first BBC interview as Home Secretary, the only specific commitment Theresa May made regarding the DNA database was to increase its size: “one of the first things we will do is to ensure that all the people who have actually been convicted of a crime and are not present on it are actually on the DNA database.”³¹ It is to be hoped that this is not where the new government’s priorities lie on this issue.

6. We will protect historic freedoms through the defence of trial by jury.

This is a Lib Dem initiative and is an issue on which the party has been extremely vocal. They argue that the jury system is the cornerstone of the criminal justice system providing an essential safeguard against arbitrary and unfair laws; juries not only ensure that justice is done, but that it is seen to be done. Legal professionals are forced to discuss law in language members of the public can understand. Thus they increase transparency in legal proceedings and help to ensure that one social class is not perceived to be sitting in judgment of another.

The Criminal Justice Act 2003 allows for trial without jury in cases where there is a substantial risk of jury tampering and in fraud cases that are extremely technical and complex. The provisions concerning jury tampering came into force in 2007, and were used for the first time in 2009. Enacting the provisions dealing with fraud cases required a vote in both houses of parliament, which the government lost in 2005. Their response was to introduce the *Fraud (Trials without Jury) Bill* in 2006, but this too was defeated. The Lib Dems have argued that as long as these provisions remain on the statute books future Labour governments will always be tempted to try to enact them.³² As such they have previously advocated their repeal, but whether or not this will now happen is unclear. The future of the provisions dealing with jury tampering is also unknown.

7. We will restore rights to non-violent protest.

The Lib Dems have long pledged to repeal sections 132-138 of the *Serious Organised Crime and Police Act 2005* which have been used to restrict the right to protest in Parliament Square. Anyone wishing to hold a demonstration there, or in any other

<http://www.guardian.co.uk/politics/2010/may/20/law-dna-fingerprint-evidence-reform>

³¹ BBC website, 12.5.10: http://news.bbc.co.uk/1/hi/uk_politics/election_2010/8678271.stm

³² The Freedom Bill, part 4 chapter 1 explanatory note:
<http://freedom.libdems.org.uk/the-freedom-bill/12-trial-by-jury>

area designated under the Act to be sensitive to national security, must give the Metropolitan Police Commissioner six days advance notice. Those who do not comply with these provisions can be arrested and jailed. If the new government intends to abolish these sections it will be a welcome move, but one that is far from groundbreaking. Politically this policy has already been defeated and the Labour government itself announced its repeal in the *Constitutional Reform and Governance Bill 2009*.

Other objectionable legislation currently in force includes the *Protection from Harassment Act 1997*, which is used by companies to restrict the right to protest near their offices, and the *Police and Justice Act 2006* which has been enacted against environmental campaigners. The terms of the latter allow police to impose bail conditions on an individual before they are charged and, as *The Guardian* reports, this allows them “to arrest high-profile activists several days before a demonstration, never actually charge them, but use the law to impose ‘conditions’ to prevent them from taking part.”³³

The amendment of these unsavoury laws would be a positive step, but the more pressing need is for a change in police practice. Far from meeting their obligation as facilitators of peaceful protest, the police have routinely imposed bureaucratic obstacles and restrictions on organisers of demonstrations. They have become increasingly preoccupied with quashing any sign of trouble before it materialises. In June 2008, James Welch, Legal Director of *Liberty*, told the Joint Committee on Human Rights that the majority of legal proceedings brought against police by demonstrators originate from ill-advised pre-emptive action.³⁴ This heavy-handed form of policing was clearly evident at the August 2008 Climate Camp where peaceful protestors were met by three rows of riot police fully equipped with truncheons, shields and helmets. The policing of demonstrators at the April 2009 G20 summit in London resulted in 270 complaints of police assault and one allegation of manslaughter. Thousands of protestors were “kettled” and detained for as long as seven hours.³⁵

Police have also been shown to routinely misuse their powers when dealing with protestors. Section 44 of the *Terrorism Act 2000* has frequently been incorrectly invoked to stop and search demonstrators. Anti-social behaviour legislation, which allows for the dispersal of gatherings of two or more people, has also been abused; for example in 2004, in Birmingham, to end protests directed at a controversial Sikh play.³⁶ Section 5 of the *Public Order Act 1986* (of which the Lib Dem manifesto

³³ The Guardian, 20.5.10: <http://www.guardian.co.uk/commentisfree/libertycentral/2010/may/20/civil-liberties-policing-law-reform>

³⁴ Minutes of evidence, question 6: <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrightts/47/8062402.htm>

³⁵ See Statewatch volume 19 nos. 1 and 2: <http://www.statewatch.org/analyses/no-99-g8-london.pdf>

³⁶ BBC website, 28.7.06: http://news.bbc.co.uk/1/hi/england/west_midlands/5223638.stm

pledges unspecified reform) allows the police to arrest individuals who cause “harassment alarm or distress” and was used in 2008 to give a court summons to a 15-year-old for holding a sign which said that scientology is a cult, and in 2006 to arrest a free speech protestor wearing a t-shirt bearing a cartoon of the prophet Muhammad.³⁷

This hostility towards the act of protest is extended to those who document it. In recent years the National Union of Journalists (NUJ) has vociferously highlighted increasing police obstruction of the media’s right to cover and publicise demonstrations. This is characterised by the restriction of access to public space, the confiscation of equipment and even physical assault. Perhaps most disturbingly, journalists and photographers are being targeted by Forward Intelligence Teams which the Metropolitan Police regularly deploys to monitor protestors. The NUJ has evidence of these teams surveilling journalists several miles away from the demonstration they were covering.³⁸

The curtailment of these police practices does not require legislation. The new government must contend with a police culture that has increasingly grown to view protesting as inherently subversive. Altering this will be no easy task and, in a pointedly inauspicious start, on the same day as the coalition’s first Queen’s speech the Conservative Mayor of London, Boris Johnson, began legal proceedings, with the Prime Minister’s consent, to forcibly remove peaceful protestors camping outside parliament.³⁹

8. We will review libel laws to protect freedom of speech.

The UK’s libel laws have long been criticised across the political spectrum for being overly complex, financially prohibitive and outdated for the digital age. The effect is that freedom of expression has become stifled for fear of legal reprisal. In the last two years, high profile attempts to impose super injunctions on the media by the English footballer John Terry and the energy company *Trafigura* have publicly illustrated the egregious nature of UK libel laws. As have a number of high profile cases in which scientists have been sued simply for stating candid professional opinions. In April 2010, the British Chiropractic Association reluctantly dropped its libel action against Dr Simon Singh after a scathing Court of Appeal judgment left them with little chance of success at a final hearing.⁴⁰ Singh had written an article in 2008 in which he questioned whether there was sufficient evidence to prove that chiropractic treatment was effective in treating a number of specific childhood

³⁷ Minutes of evidence, question 6:

<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/8062402.htm>

³⁸ NUJ website, 22.9.08: <http://www.nuj.org.uk/innerPagenuj.html?docid=910>

³⁹ The Independent, 26.5.10: <http://www.independent.co.uk/news/uk/politics/pledges-on-protest-rights-overshadowed-by-moves-against-peace-camp-1982939.html>

⁴⁰ The Guardian, 15.4.10: <http://www.guardian.co.uk/science/2010/apr/15/simon-singh-libel-case-dropped>

medical conditions. Dr Peter Wilmhurst, a consultant cardiologist, is being sued in the UK for an interview he gave to an American magazine whilst at an American conference.⁴¹ The claim would have no chance of success in an American court and it is the ease with which cases can be brought in the UK that has made London the libel capital of the world.

Both parties therefore made manifesto commitments to review and reform libel law. The Conservatives promised “to protect freedom of speech, reduce costs and discourage libel tourism.” The Lib Dems went further, pledging to “protect free speech, investigative journalism and academic peer-reviewed publishing through reform of the English and Welsh libel laws - including by requiring corporations to show damage and prove malice or recklessness, and by providing a robust responsible journalism defence.”

In an attempt to aid the process of reform, Lord Lester published a *Defamation Bill* on 27 May 2010. The Liberal Democrat peer’s private member’s bill seeks to redress the balance between the protection of an individual’s reputation and the right to free speech: “It creates a framework of principles rather than a rigid and inflexible code and it seeks a fair balance between reputation and public information on matters of public interest.”⁴² But *The International Forum for Responsible Media Blog*, which is part of the *Guardian Legal Network*, analysed the bill and concluded that:

*...it is not radical or wide ranging and does not ‘rebalance’ or ‘recast’ the law of libel. If anything it will add a further layers (sic) of complexity and increase costs. It is not a substitute for a thoroughgoing review of the existing law.*⁴³

Such a review is likely to be forthcoming, at which time the government’s intentions for libel laws should become clearer.

9. We will introduce safeguards against the misuse of anti-terrorism legislation.

In their manifestos, the Lib Dems said they would “stop councils from spying on people” and the Conservatives committed to “curtailing the surveillance powers that allow some councils to use anti-terrorism laws to spy on people making trivial mistakes or minor breaches of the rules.” Although neither mentions it by name, both parties are referring to the application of the *Regulation of Investigatory*

⁴¹ The Telegraph, 25.5.10:
<http://www.telegraph.co.uk/news/newstoppers/politics/7760491/Reform-of-our-libel-law-is-long-overdue.html>

⁴² The Times, 26.5.10:
<http://timesonline.typepad.com/law/2010/05/lord-lester-publishes-bill-to-reform-archaic-libel-laws.html>

⁴³ Inform blog: <http://inform.wordpress.com/2010/05/27/lord-lesters-defamation-bill-an-overview/>

Powers Act 2000 (RIPA). The Act regulates the circumstances and methods by which public bodies can conduct surveillance and investigations, which includes giving them the power to intercept emails and access private communications data. In 2000 only nine organisations could use RIPA powers, but they have subsequently been afforded to nearly 800 public bodies including local councils, the Charity Commission, Ofcom and the Post Office Investigation Branch.

The creation of these powers was justified as a means to combat terrorism and organised crime in exceptional circumstances, but in reality they have been routinely used against members of the public for minor offences. Only the interception of communications data requires a warrant from the Secretary of State; all other powers are currently “self-authorising” which means that a council official can access communications data or authorise a surveillance operation without needing to obtain the approval of an outside authority such as a magistrate or the police.⁴⁴

On 23 May, a *Big Brother Watch* report showed that councils in Great Britain had conducted 8,575 RIPA operations in the past two years at an average of 11 a day.⁴⁵ Behaviour that councils have deemed worthy of surveilling includes littering, breaches of planning regulations, letting a dog foul a public footpath, and breaking the smoking ban. In Croydon a council tree officer used RIPA to access the mobile phone records of a builder he believed to have illegally pruned a tree.⁴⁶ Astonishingly, councils can authorise weeks of surveillance against individuals suspected of committing these sorts of offences with no obligation to ever inform them that they are being monitored. Statistics published in March 2009 indicated that only 9% of over 10,000 RIPA authorisations led to a successful prosecution, caution or fixed-penalty notice.⁴⁷

The “communities and local government” section of the coalition agreement says:

*We will ban the use of powers in the Regulation of Investigatory Powers Act (RIPA) by councils, unless they are signed off by a magistrate and required for stopping serious crime.*⁴⁸

⁴⁴ The police are using RIPA on a grand scale to trawl through vast quantities of personal communications data, as is detailed later in this article.

⁴⁵ Big Brother Watch website 23.5.10: <http://www.bigbrotherwatch.org.uk/home/2010/05/the-grim-ripa-local-councils-authorising-11-covert-surveillance-operations-a-day.html>

⁴⁶ This is Croydon Today website, 3.11.09: <http://www.thisiscroydontoday.co.uk/news/Council-uses-anti-terror-laws-pruned-tree/article-1466974-detail/article.html>

⁴⁷ BBC website, 26.3.09: <http://news.bbc.co.uk/1/hi/7964411.stm>

⁴⁸ The Coalition: our programme for government, p. 12: http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

While this is certainly an improvement on the existing system the new government should go further and outlaw the practice completely. As Alex Deane, the Director of *Big Brother Watch*, says:

Now that the absurd and excessive use of RIPA surveillance has been revealed, these powers have to be taken away from Councils. The Coalition Government plan to force councils to get warrants before snooping on us is good, but doesn't go far enough. If the offence is serious enough to merit covert surveillance, then it should be in the hands of the police.

The other major piece of anti-terrorism legislation that is being seriously misused is section 44 of the *Terrorism Act 2000*. The act gives police the right to indiscriminately stop and search people without reasonable suspicion in areas that have been designated to be sensitive to national security: this includes the whole of greater London. Police invoked these powers on 256,026 occasions in England and Wales between April 2008 and March 2009. The Metropolitan Police and Transport Police were responsible for 95% of this total. Of this colossal figure only 1,452 stops resulted in arrest, less than 0.6% of the total number, and the vast majority of these were for offences unrelated to terrorism.⁴⁹ In June 2010, the Home Office revealed that, since 2001, procedural errors in 40 separate section 44 police operations have led to thousands of people being unlawfully stopped and searched.⁵⁰ Most of these operations were illegal because they had lasted beyond the 28 day statutory limit, and some had not been authorised by the Home Secretary as is required by law.

Section 44 powers have been used to intimidate protestors and impede photography in public places. A climate of suspicion has been cultivated in which anyone taking a photograph of a prominent building or landmark is potentially seen to be conducting reconnaissance ahead of a terrorist attack. Worse still, some police officers believe photography in section 44 areas to be illegal and there is a mountain of anecdotal evidence of photographers, both professional and amateur, being obstructed in public spaces.⁵¹

In January 2010, the ECtHR found section 44 to breach Article 8 of the European Convention on Human Rights which provides the right to respect for private life.⁵² The judgment objected not only to the manner in which anti-terrorism powers are being used, but the whole process by which they are authorised. Parliament and the courts are not providing sufficient checks and balances against misuse and police officers are afforded too much individual autonomy when deciding whether to stop

⁴⁹ Home Office Statistical Bulletin 2008/09: <http://www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf>

⁵⁰ The Guardian, 10.6.10: <http://www.guardian.co.uk/uk/2010/jun/10/anti-terror-law-illegal-stop-search>

⁵¹ See: Statewatch volume 18 no 3 and volume 19 no 4

⁵² Case of Gillan and Quinton v. The United Kingdom (Application no. 4158/05), 12.1.10: <http://www.statewatch.org/news/2010/jan/echr-judgment-gillan-quinton.pdf>

and search someone. The Labour government appealed against this ruling with little chance of success, and it may now be dropped. Encouragingly, the new government has pledged to ensure that “anti-terrorism legislation strikes the right balance between protecting the public, strengthening social cohesion and protecting civil liberties” and a Home Office spokesperson told *Amateur Photographer* that: “we will include terrorism stop and search powers in our review of terrorism and security powers.”⁵³ Not the first time, however, the main challenge will likely come in amending police practice. In the last two years the National Policing Improvement Agency, the Home Office and even the Prime Minister have all published guidance to the police reaffirming the rights of photographers with negligible result.⁵⁴

10. We will further regulate CCTV.

This is a Lib Dem manifesto commitment to address the growth of surveillance in public places. Britain is estimated to operate a fifth of the world’s CCTV cameras, most of which are owned by private companies whose operational practices and compliance with the *Data Protection Act* are not adequately regulated. Vast sums of public money have also been spent on their introduction. In December 2009, freedom of information requests made by *Big Brother Watch* showed that the number of cameras owned by local councils had almost trebled in less than ten years, from 21,000 to 60,000.⁵⁵ But crucially there is no evidence that the use of CCTV cameras helps to prevent or solve crime. In 2008 it was revealed that only 3% of street robberies were solved using CCTV images and the UK has the highest recorded rate of violent crime in Europe.⁵⁶

Technological developments have also meant that the practice is becoming more intrusive. Some cameras are fitted with facial recognition technology to identify suspects, and in the last few years there has been a vast rise in the number of cameras incorporating automatic car number plate recognition software (ANPR). A system to surveil and record the movements of every vehicle on British roads was originally developed by police in March 2006, but has since expanded unchecked. In February 2010, the Association of Police Chief Officers revealed that 10,502 ANPR enabled cameras were passing information to the National ANPR Data Centre. Between 10 and 14 million photographs are being processed every day, many of

⁵³ Amateur Photographer website, 25.5.10: http://www.amateurphotographer.co.uk/news/Section_44_stop_and_search_terror_law_set_for_overhaul_photographers_told_update_news_298438.html

⁵⁴ Amateur Photographer website, 5.12.09: http://www.amateurphotographer.co.uk/news/Photographers_campaign_forces_police_Uturn_AP_comment_news_292612.html

⁵⁵ Big Brother Watch website, 18.12.09: <http://www.bigbrotherwatch.org.uk/home/2009/12/big-brother-is-watching-local-council-controlled-cctv-cameras-treble-in-a-decade.html>

⁵⁶ The Guardian, 6.5.08: <http://www.guardian.co.uk/uk/2008/may/06/ukcrime1>

which contain images of the vehicle's driver and front-seat passengers.⁵⁷ These images will be retained for at least two years. Law enforcement agencies in other EU member states can use the database under the Prüm Treaty, and in April 2008 it emerged that the government has also granted access to the USA.⁵⁸

There is also worrying evidence that the ANPR scheme is being dubiously employed. In January 2010, an *Independent on Sunday* report revealed that police are using the technology to meet government performance targets and raise revenue. The report also said that records stored on the ANPR database are "at least 30 per cent inaccurate" leading to wrongful arrests and car seizures.⁵⁹ On 4 June 2010, an investigation by *The Guardian* revealed that 150 ANPR cameras, 40 of them "covert", have been installed in predominantly Muslim areas of Birmingham's suburbs to monitor individuals suspected by security agencies of being "extremist."⁶⁰ Local councillors and members of the Muslim community were misled over the true nature of the £3 million scheme - they were told it was to tackle vehicle crime, drug-dealing and anti-social behaviour - which was funded by the Terrorism and Allied Matters fund. On 17 June 2010, use of the cameras was temporarily suspended pending a "full and in-depth consultation."⁶¹

Civil liberty organisations have been consistently critical of the growth of ANPR technology. In April 2010, Liberty announced that it intended to launch the first legal challenge to the surveillance system. The organisation's director, Shami Chakrabarti, said:

It's bad enough that images and movements of millions of innocent motorists are being stored for years on end...That the police are doing this with no legislative basis shows a contempt for parliament, personal privacy and the law. Yet another bloated database is crying out for legal challenge and we will happily oblige.⁶²

⁵⁷ Kable website, 3.2.10: <http://www.kable.co.uk/national-anpr-data-centre-police-acpo-03feb10>

⁵⁸ The Telegraph, 21.4.08: <http://www.telegraph.co.uk/news/uknews/1896241/New-anti-terrorism-rules-allow-US-to-spy-on-British-motorists.html>

⁵⁹ The Independent on Sunday, 17.1.10: <http://www.independent.co.uk/news/uk/crime/the-laughing-policemen-inaccurate-data-boosts-arrest-rate-1870416.html>

⁶⁰ The Guardian, 4.6.10: <http://www.guardian.co.uk/uk/2010/jun/04/birmingham-surveillance-cameras-muslim-community>

⁶¹ The Guardian, 17.6.10: <http://www.guardian.co.uk/uk/2010/jun/17/birmingham-stops-muslim-surveillance-scheme>

⁶² The Times, 4.4.10: <http://www.timesonline.co.uk/tol/news/uk/crime/article7086783.ece>

In their Freedom Bill the Lib Dems advocate the establishment of a Royal Commission to make recommendations on the use and regulation of CCTV.⁶³ For now the new government has simply made an unspecified commitment to introduce new legislation.

11. We will end the storage of internet and email records without good reason.

Announced in October 2008, the Interception Modernisation Programme (IMP) is a Labour initiative to intercept and record every phone call, text message, email, chat-room discussion and website visit made in the UK. The content of what was said or written would not be retained, but email and website addresses, phone numbers and contact information from social networking services including instant messengers, Facebook and Skype would be held. The government initially planned to store this data in a massive central database, but by April 2009 had decided it would be more practical to outsource this responsibility to Communications Service Providers (CSPs): primarily internet service providers and telecommunications companies.

Since 2003, these organisations have already retained subscriber and traffic data as part of a “voluntary code” under the *Anti-Terrorism, Crime and Security Act 2001*. The Labour government believed that the practice should be made mandatory and, facing heavy opposition in the UK from the House of Lords, sought an agreement at EU level which would carry the force of European law. It used its rotating presidency of the EU Council to “railroad” the *EC Data Retention Directive 2006* through the legislative process using a mix of political pressure and moral imperative following the 7 July 2005 terrorist attacks on London. The Directive compels member states to store citizens’ telecommunications data for a period of six to 24 months but, significantly, does not provide safeguards over who can access this data and on what grounds. In 2007, the “voluntary code” for CSPs was made mandatory by statutory order (meaning no debate)⁶⁴ with the justification that the UK was merely fulfilling its obligations under EU law.

The IMP would oblige CSPs to increase drastically the volume of information they hold on their customers for access by police and security services. Under the *Regulation of Investigatory Powers Act 2000*, these bodies can currently access retained data simply on the basis of an “authorisation” by a senior officer, with no form of judicial scrutiny. This led UK law enforcement agencies to access personal communications records a staggering 1.7 million times (1,164 times per day) between 2005 and 2009, in what surely included speculative ‘fishing’, data-mining

⁶³ The Freedom Bill, part 2 chapter 4 explanatory note:
<http://freedom.libdems.org.uk/the-freedom-bill/7-regulation-of-cctv>

⁶⁴ See: http://www.opsi.gov.uk/si/si2007/ukSI_20072199_en_1

and subject-based profiling exercises.⁶⁵ All data stored under the IMP could be accessed in exactly the same way.

Responding to an April 2009 government consultation document, *Protecting the Public in a Changing Communications Environment*, many CSPs expressed grave concern over the cost and technical feasibility of intercepting data on such a grand scale.⁶⁶ As a result of these misgivings, and fearful of negative publicity in the run-up to the May 2010 election, the government dropped a bill to establish the scheme from the November 2009 Queen's speech. However, in the same month, information provided in a written parliamentary answer by a Home Office minister revealed that this would not delay the creation of the IMP which the government expected to be fully operational by 2016.⁶⁷

The Lib Dems have been consistently critical of the IMP and promised in their manifesto to "end plans to store your email and internet records without good cause." In October 2008, Chris Huhne argued that "the government's Orwellian plans for a vast database of our private communications are deeply worrying" and that "these proposals are incompatible with a free country and a free people."⁶⁸ The Conservatives have also been critical of the IMP, but promised only to review the scheme and made no mention of it in their manifesto. In January 2010, then shadow security minister, Baroness Pauline Neville-Jones, said that the Labour government had not provided "any evidence to suggest that the universal collection, retention and processing of communications data would actually provide more value to intelligence and law enforcement investigations than the targeted collection of communications data in relation to specific individuals or groups."⁶⁹

Whatever policy it eventually adopts, the problem facing the new government is that the UK is legally bound to implement the EU Data Retention Directive: it cannot opt out. This means that while access to retained data can be better restricted, for example by requiring judicial authorisation before data can be accessed, and the length of time records are held can be reduced to six months, fundamentally the new government is currently unable to abandon Labour's data retention regime, whether it desires to or not.

⁶⁵ So far four sets of figures have been put on record: 1 January 2005 - 31 March 2006: 439,054; 1 April - 31 December 2006: 253,557; 2007: 519,260; 2008: 504,073: <http://www.statewatch.org/uk-tel-tap-reports.htm>

⁶⁶ The Register website, 9.11.09: http://www.theregister.co.uk/2009/11/09/imp_hold; *Protecting the Public in a Changing Environment*, April 2009: <http://www.official-documents.gov.uk/document/cm75/7586/7586.pdf>

⁶⁷ Kable website, 17.11.09: <http://www.kable.co.uk/communications-interception-programme-continues-17nov09>

⁶⁸ BBC website, 15.10.08: http://news.bbc.co.uk/1/hi/uk_politics/7671046.stm

⁶⁹ Silicon.com website, 22.1.10: <http://m.silicon.com/management/public-sector/2010/01/22/which-of-labours-big-it-projects-will-survive-the-tory-axe-39501472/10/>

12. We will introduce a new mechanism to prevent the proliferation of unnecessary new criminal offences.

This is a Lib Dem manifesto commitment to:

...halt the increase in unnecessary new offences with the creation of a 'stop unit' in the Cabinet Office. Every department in Whitehall would have to convince this unit of the need for a new offence.

In 2008, Chris Huhne, then Lib Dem Home Affairs spokesman, revealed that a total of 3,605 new criminal offences had been introduced since Labour came to power in May 1997.⁷⁰ Only 1,238 of these were introduced by primary legislation and debated in parliament, with the remaining 2,367 coming from secondary legislation predominantly in the form of statutory instruments. Huhne argued that “most crimes that people care about have been illegal for years” therefore “this legislative diarrhoea is not about making us safer, because it does not help enforce the laws that we have one jot.” Ultimate responsibility for rejecting unjust laws rests with parliament, but anything that helps reverse the rampant criminalisation of the British public that took place under the outgoing Labour government is to be welcomed.

13. 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.

The *Human Rights Act* (HRA) was passed in 1998 and came into force fully in October 2000. It incorporates the fundamental rights and freedoms contained in the European Convention on Human Rights into UK law with the intention of giving them “further legal effect”. This means that every public authority must ensure that their actions comply with the Convention and UK judges are obliged to interpret legislation in a way that is compatible with it. It also means that UK courts must directly apply the Convention to cases brought before them so individuals now only take cases to the European Court of Human Rights (ECtHR) in Strasbourg as a last resort.

The Conservatives have strongly criticised the Act for putting the interests of criminals above the rights of victims. David Cameron first proposed its repeal in June 2006 and stated his case more vociferously in August 2007 when an Asylum and Immigration Tribunal ruled that the murderer of headteacher Philip Lawrence could

⁷⁰ The Telegraph, 4.9.08:

<http://www.telegraph.co.uk/news/uknews/2679148/Labour-has-created-3600-new-offences-since-1997.html>

not be deported because it would breach his right to family life.⁷¹ Accordingly, the Conservative manifesto includes a commitment to “replace the Human Rights Act with a UK Bill of Rights.” By contrast the Lib Dem manifesto pledges to protect it. The Act’s future has always been a contentious and divisive issue, and in the aftermath of the election its repeal was widely reported to be a policy the Conservatives were willing to shelve. This was seemingly confirmed by the surprise appointment of Ken Clarke to Secretary of State for Justice - in 2006 he derided Cameron’s plan for a UK bill of rights as “xenophobic and legal nonsense” - and the policy’s omission from the draft coalition agreement published on 12 May.⁷² But on 18 May, the Special Immigration Appeals Commission (SIAC) ruled that two Pakistani students accused of terrorism offences, Abid Naseer and Ahmed Faraz Khan, despite posing a “serious threat” could not be deported because there was a risk that they would be tortured or killed in their country of origin (the principle of *non-refoulement*).⁷³ Following public outcries by the right-wing press and Conservative backbenchers, Theresa May announced that a commission of enquiry would be established. A day later, in an interview in *The Times*, Nick Clegg insisted that the HRA was “an absolute constitutional cornerstone” and that any government would tamper with it at its peril.”⁷⁴ On 16 May, at a Lib Dem party meeting, Chris Huhne, the Secretary of State for Energy and Climate Change, and Lord McNally, Minister of State for Justice, had both said they would resign were the Act to be repealed.⁷⁵

Precisely what could be achieved by repealing the HRA is unclear. Many of its critics fail to comprehend that even were it repealed, the UK would still be legally bound by the European Convention on Human Rights, just as it has been since 1953. The HRA simply incorporated the Convention into domestic law, placing its application in the hands of British judges, a move the Conservatives supported at the time. This means that as far as deporting terrorist suspects goes, the UK is obliged to abide by the principle of *non-refoulement* by the Convention Relating to the Status of Refugees 1951, the UN Convention Against Torture 1984 and the European Convention on Human Rights. Abolishing the HRA would not change this, instead the UK would need to withdraw from these Conventions: an unthinkable act the Conservatives have no intention of taking. Speaking in March 2009, the then shadow Justice Secretary Dominic Grieve confirmed that:

⁷¹ The Telegraph, 22.8.07: <http://www.telegraph.co.uk/news/uknews/1560975/David-Cameron-Scrap-the-Human-Rights-Act.html>

⁷² The Independent, 28.6.06: <http://www.independent.co.uk/news/uk/politics/ken-clarke-brands-cameron-plan-for-bill-of-rights-as-xenophobic-405797.html>

⁷³ BBC website, 18.5.10: <http://news.bbc.co.uk/1/hi/8688501.stm>

⁷⁴ The Times, 19.5.10: <http://www.timesonline.co.uk/tol/news/politics/article7130256.ece>

⁷⁵ The Guardian, 19.5.10: <http://www.guardian.co.uk/commentisfree/libertycentral/2010/may/19/human-rights-coalition>

*It [a British bill of rights] would have to be, and we would intend it to be, compatible with continued adherence to the European Convention on Human Rights. We intend to remain signatories and the Strasbourg Court will still be able to pass decisions in respect of the UK.*⁷⁶

The Conservatives intend for a bill of rights to alter the degree of deference British courts pay to ECtHR case law: “We would want to reword it to emphasise the leeway of our national courts to have regard to our own national jurisprudence and traditions and to other common law precedents while still acknowledging the relevance of Strasbourg Court decisions.”⁷⁷ This, David Cameron alleged, “strengthens our hand in the fight against terrorism and crime.”⁷⁸ Writing in *The Guardian*, Helena Kennedy disagreed: “This strange and novel argument for introducing a bill of rights has bewildered our most eminent jurists, who do not see how such a change is possible while remaining signed up to the ECHR.”⁷⁹ Indeed, Grieve himself maintained that he would like to “use the Convention rights as currently drafted, as a starting point” for a bill of rights and insisted that it would not allow for the deportation of individuals who risk being tortured: “It’s not going to happen. It can’t happen and it will not.”⁸⁰

These statements are at odds with the wishes of many Conservative MPs, supporters and newspapers who want the HRA to be torn up. These groups have scorned the nuanced solutions proposed by the party leadership and have exerted considerable pressure on them to substantively alter the amount of judicial power the ECtHR is afforded. So it remains uncertain precisely what form a Conservative bill of rights would take, but it is hard to envisage a major assault on the HRA while their coalition with the Lib Dems remains intact.

There is also some common ground here. The Conservatives have indicated that their bill of rights could be used to protect the right to trial by jury, limit the power of the state to impose administrative sanctions - such as fixed penalty notices - without due legal process, further protect freedom of expression and address the shortcomings of UK privacy law: all measures that the Lib Dems, and civil libertarians in general, can support.

⁷⁶ Law Society Gazette, 26.3.09: <http://www.lawgazette.co.uk/features/clear-blue-water>

⁷⁷ The Telegraph, 30.11.09: <http://www.telegraph.co.uk/news/uknews/law-and-order/6694262/British-courts-will-be-able-to-ignore-European-human-rights-rulings-says-Dominic-Grieve.html>

⁷⁸ This is Gloucestershire, 20.1.10: <http://www.thisisgloucestershire.co.uk/news/David-Cameron-answers-questions/article-1728873-detail/article.html>

⁷⁹ The Guardian, 19.5.10: <http://www.guardian.co.uk/commentisfree/libertycentral/2010/may/19/human-rights-coalition>

⁸⁰ The Times, 21.10.09: <http://business.timesonline.co.uk/tol/business/law/columnists/article6884430.ece>

The possibility of repealing the HRA is not even mentioned in the coalition agreement. Predictably, this riled elements of the Conservative media and backbench MPs who have accused the party leadership of betraying their voters. *Liberty* welcomed the implication that protections afforded by the HRA would be extended but said that it is “extremely troubling that this isn’t made more explicit...we fear therefore that the HRA may still be under threat.”⁸¹ A great deal of uncertainty and misunderstanding surrounds this issue and this is unlikely to change any time soon.

Part III: What other reforms are needed?

On 19 May, in his first major speech as Deputy Prime Minister, Nick Clegg announced that the new government would enact “the most significant programme of empowerment by a British government since the great enfranchisement of the 19th century. The biggest shake-up of our democracy since 1832, when the Great Reform Act redrew the boundaries of British democracy.”⁸² This is no small claim and, though historians might question his interpretation of the impact of the Great Reform Act, Clegg’s intentions are clear. He went further: “As we tear through the statute book, we’ll do something no government ever has: we will ask you which laws you think should go.” This is just as well because a number of Labour’s most deplorable civil liberty violations have not been addressed in the coalition agreement or Queen’s speech. While this does not necessarily mean the new government supports these policies or intends to turn a blind eye, a formal recognition that they must be addressed would be welcomed.

14. The “database state”

For example, even with the abolition of Labour’s National Identity Scheme much of the “database state” will remain in place. In March 2009, a report commissioned by the *Joseph Rowntree Reform Trust*, titled *Database State*, found that only six of the 46 public sector databases it assessed had a proper legal basis and were “proportionate and necessary in a democratic society.”⁸³ Ten government databases were found to be “almost certainly illegal under human rights or data protection law; they should be scrapped or substantially redesigned” and the remaining 29 had “significant problems with privacy or effectiveness and could fall foul of a legal challenge.”⁸⁴ Along with the DNA database, the NIR and ContactPoint, the seven most objectionable databases were found to be:

⁸¹ Liberty’s analysis of the Coalition Programme for government, p. 4: <http://www.liberty-human-rights.org.uk/pdfs/policy10/programme-for-government-liberty-s-analysis.pdf>

⁸² BBC website, 19.5.10: <http://news.bbc.co.uk/1/hi/8691753.stm>

⁸³ Database State, p. 2: <http://www.jrrt.org.uk/uploads/Database%20State.pdf>

⁸⁴ Ibid, p. 4

- *The NHS Detailed Care Record [now more commonly known as the Summary Care Record], which will hold GP and hospital records in remote servers controlled by the government, but to which many care providers can add their own comments, wikipedia-style, without proper control or accountability; and the Secondary Uses Service, which holds summaries of hospital and other treatment in a central system to support NHS administration and research;*
- *The electronic Common Assessment Framework, which holds an assessment of a child's welfare needs. It can include sensitive and subjective information, and is too widely disseminated;*
- *ONSET, which is a Home Office system that gathers information from many sources and seeks to predict which children will offend in the future;*
- *The DWP's [Department for Work and Pensions] cross-departmental data sharing programme, which involves sharing large amounts of personal information with other government departments and the private sector;*
- *The Audit Commission's National Fraud Initiative, which collects sensitive information from many different sources and under the Serious and Organised Crime Act 2007 is absolved from any breaches of confidentiality;*
- *The communications database and other aspects of the Interception Modernisation Programme, which will hold everyone's communication traffic data such as itemised phone bills, email headers and mobile phone location history; and*
- *The Prüm Framework, which allows law enforcement information to be shared between EU Member States without proper data protection.⁸⁵*

The Conservative manifesto pledged to “scale back” the database state. To deliver on this promise the proposed abolition of the NIR and ContactPoint needs to be just a first step. The databases listed above need to be abolished or drastically redesigned and the operational practices of many others should be subjected to independent review. But to reverse the massive centralisation of personal data that took place under the Labour government will require not only legislative reform but also a sea change in the public sector's approach to individual privacy. As an indicator of the potential for misuse, on average, in 2008, a public official was sacked or reprimanded once every working day for losing data or breaching data protection rules.⁸⁶

⁸⁵ Ibid, p. 5

⁸⁶ The Telegraph, 3.11.08:
<http://www.telegraph.co.uk/news/3374341/One-official-disciplined-over-data-loss-every-day.html>

The early signs are not good. Both parties had promised to decentralise NHS IT infrastructure prior to the election but, on 3 June 2010, the Conservative health minister, Simon Burns, announced that patient data will continue to be uploaded to the Summary Care Record database.⁸⁷ *Big Brother Watch* called this decision “a disgraceful u-turn. The Coalition wants us to believe that they are serious about privacy and civil liberties - this is their first real test, and they have failed it.”⁸⁸

15. The Digital Economy Act

The controversial *Digital Economy Act* is also conspicuous by its absence from the coalition agreement. Passed in April 2010, the Act has yet to come into full force but will eventually compel internet service providers to temporarily suspend the internet connection of individuals suspected of having illegally downloaded copyrighted material and block access to websites believed to be illegally hosting copyrighted content. It was debated by just 20 people in the House of Commons leading Nick Clegg to castigate the manner in which it was “rammed through parliament at the last minute...[its passage is] a classic example of what’s wrong with Westminster.”⁸⁹ He also said:

*It badly needed more debate and amendment, and we are extremely worried that it will now lead to completely innocent people having their internet connections cut off. It was far too heavily weighted in favour of the big corporations and those who are worried about too much information becoming available. It badly needs to be repealed, and the issues revisited.*⁹⁰

The Lib Dems’ involvement in the new government initially engendered optimism among critics of this Act, but it has slowly faded after first the coalition agreement and then the Queen’s speech made no mention of it. It is possible the issue might be addressed in the Freedom Bill, but it seems more likely that the Conservatives are holding sway on this issue. Speaking in April 2010, David Cameron defended the Act: “I’m confident that the way the legislation is drafted, thanks to Conservative amendments, means that we are by no means rushing in to action.”⁹¹

⁸⁷ Commons Hansard written answers text, 3 June 2010: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100603/text/100603w0009.htm#10060344000039>

⁸⁸ Big Brother Watch, 4.6.10: <http://www.bigbrotherwatch.org.uk/home/2010/06/the-coalition-have-performed-a-disgraceful-uturn-on-the-summary-care-record.html>

⁸⁹ BBC website, 29.4.10: <http://news.bbc.co.uk/1/hi/8651780.stm>

⁹⁰ PC Pro website, 16.4.10: <http://www.pcpro.co.uk/news/357322/clegg-digital-economy-bill-must-be-repealed#ixzz0q6jmUQQy>

⁹¹ Think Broadband website 28.4.10: <http://www.thinkbroadband.com/news/4229-labour-conservative-and-green-response-to-deb-dea-question.html>

In its current form the DEA might render meaningless the new government's commitment to "end the storage of internet and email records without good reason." It is difficult to envisage how illegal downloads and website copyright infringements could be detected without blanket internet surveillance by service providers. That the DEA could provide the coalition with "good reason" to persist with Labour's mandatory data retention regime is extremely worrying.

16. Anti-social behaviour legislation

New Labour's crusade against "anti-social behaviour" has also gone unmentioned. Its legacy includes the *Anti Social Behaviour Act 2003*, which gives the police a number of blanket powers including the authority to disperse groups of two or more individuals who have gathered in a public space, and Anti Social Behaviour Orders (ASBOs). These civil orders can be issued to anyone deemed to have caused "harassment, alarm or distress" and serve to criminalise overtly non-criminal behaviour; under an ASBO an individual can be arrested and jailed for up to five years for being sarcastic, wearing a hooded top or crossing a road.⁹² They effectively bypass criminal law and create a shadow legal system in which people are punished on the basis that their neighbours have found their behaviour to be objectionable. Public humiliation often follows in the form of posters and leaflets "naming and shaming" ASBO recipients within the local community. This damaging practice is particularly troubling because ASBOs have been given to individuals with mental health problems and disproportionately used against children as young as ten, stigmatising them at any early age. Both the Conservatives and, in particular, the Lib Dems were critical of ASBOs whilst in opposition and it is disappointing that their misuse has not been addressed by the coalition government.

17. Anti-terrorism legislation

Perhaps the new coalition's greatest shortcoming is their failure to make any firm commitment to repeal the raft of anti-terrorism legislation introduced by the Labour government. Despite a vast increase in the number of low-level terrorism offences, many of which *Liberty* recently described as "rotten to the core," it is incredibly difficult to prosecute individuals suspected of involvement in terrorism.⁹³ This is partly because Britain is the only country in the common law world to ban the use of intercept evidence in its courts. This is done on the basis that it would undermine national security by revealing the operational practices and capacities of its intelligence agencies. Since March 2005, the solution to this has been control orders which allow the Home Secretary to place suspects under indefinite house arrest without charge or trial. They are issued in "closed hearings" so that secret intelligence can be heard without its source being compromised. Neither the

⁹² See Statewatch ASBOwatch website: <http://www.statewatch.org/asbo/ASBOwatch.html>

⁹³ Liberty's analysis of the Coalition Programme for government, p. 3: <http://www.liberty-human-rights.org.uk/pdfs/policy10/programme-for-government-liberty-s-analysis.pdf>

individual being accused nor their lawyer can attend this hearing or see the material brought before the court, which means they have no idea what charges are being levelled against them and no means to prove their innocence. Breaching a control order is a criminal offence and is punishable by up to five years in jail or an unlimited fine. Further draconian powers were introduced by *The Terrorism Act 2006* which allows police to detain suspects for up to 28 days without charge.

These practices have served to undermine the fundamental democratic tenets of the presumption of innocence and the right to a fair trial. The Lib Dems have been consistently critical of all three policies and their manifesto promised to make intercept evidence admissible in court, scrap control orders, and reduce the maximum period of pre-charge detention to 14 days. It is therefore quite extraordinary that Clegg's emphatically worded speech on political reform made no direct mention of any of these things. This inconsistency is more in keeping with the Conservatives who have often chastised Labour policies in the media - in June 2009 Baroness Neville-Jones said control orders were "instruments of executive power and inherently objectionable" - but then not followed this up in parliament (they voted in favour of their renewal in 2007 and abstained in 2008 and 2009).⁹⁴ The Conservatives had promised only to review the use of anti-terrorism legislation, and unfortunately this is also as far as the "National Security" section of the coalition agreement goes:

*We will urgently review Control Orders, as part of a wider review of counter-terrorist legislation, measures and programmes. We will seek to find a practical way to allow the use of intercept evidence in court.*⁹⁵

Henry Porter suggests that this debate has been kept separate from the Freedom Bill because "the government does not want discussion of terror laws to obstruct the swift repeal of Labour's attack on liberty in other areas."⁹⁶ This may be the case, but it is unsatisfactory that several weeks into the life of the coalition these vague commitments are the only indication of intent we have been given on an issue of unquestionable importance. That the treatment of terrorism suspects has yet to receive the attention it deserves is extremely troubling not least because these schemes continue to undermine public confidence in the law. The journalist Andy Worthington argues that "the Labour government, by using secret evidence in terror cases and holding men without charge or trial, created a kind of legal black hole in

⁹⁴ The Guardian, 12.6.09:
<http://www.guardian.co.uk/commentisfree/libertycentral/2009/jun/12/control-orders-conservatives>

⁹⁵ The Coalition: our programme for government, p. 24:
http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

⁹⁶ The Guardian, 16.5.10:
<http://www.guardian.co.uk/commentisfree/2010/may/16/henry-porter-civil-liberties-coalition>

which fearmongering, whipped up by innuendo, was allowed to thrive.”⁹⁷ The media hysteria generated by the 18 May 2010 SIAC ruling on the deportation of two Pakistani students illustrates this perfectly. The *Human Rights Act* was attacked from all sides when in reality the government’s inability to prosecute the accused is the root cause of the legal quandary. Speaking after the hearing their solicitor, Gareth Peirce, said:

*It's no victory, even though the young men have won...They have been stigmatised for life and put at risk or even further risk in their own country on the basis of the shocking phenomenon of secret evidence. It's no way to conduct justice. If people have committed a crime, put them on trial.*⁹⁸

In June 2009, the House of Lords had reached a similar conclusion when it ruled that secret evidence used to impose control orders on three men breached their Article 6 Convention rights to a fair trial.⁹⁹ The irony is that, having opposed control orders so vociferously in opposition, the Lib Dems are now part of a government that has already used them.¹⁰⁰

These policies will be remembered as defining characteristics of New Labour’s time in power. The coalition would do well to disassociate themselves from the control order regime quickly.

Part IV: Conclusion

In 1997, New Labour swept to power and passed the Human Rights Act in what proved to be a monumental false dawn for civil libertarians. Unsurprisingly, many have therefore approached the commitments of the coalition agreement with a mix of optimism and caution. In the last few weeks, activists and journalists have warned: that it is not possible to predict how the responsibilities and pressures of public office will warp the liberal intentions of politicians; that the Conservatives have a history of being liberal in opposition and repressive in power; that the coalition has secured a series of easy uncontroversial victories against politically bankrupt Labour policies; and that, in part because of this, major splits will inevitably emerge.¹⁰¹ All of these things may be true, and most campaigning

⁹⁷ Andy Worthington website, 20.5.10: <http://www.andyworthington.co.uk/2010/05/20/in-the-guardian-terror-deportation-debate-misses-the-point/>

⁹⁸ The Guardian, 18.5.10: <http://www.guardian.co.uk/uk/2010/may/18/pakistani-students-terror-suspects-deportation>

⁹⁹ Amnesty International, 10.6.09: <http://www.amnesty.org/en/news-and-updates/news/uk-law-lords-rule-control-orders-20090610>

¹⁰⁰ The Guardian, 23.5.10: <http://www.guardian.co.uk/uk/2010/may/23/control-orders-controversy-liberal-democrats>

¹⁰¹ The Times, 19.5.10: http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article7130101.ece;

organisations have rightly urged their supporters to be more vigilant than ever to ensure that rhetoric is translated into definitive change. This cannot be achieved solely through legislative reform. The new government will also have to persuade the public sector to relinquish many Labour policies and practices to which it has become firmly wedded over the last 13 years - no mean feat. Important tests of the coalition's true nature lie ahead. Many of their commitments on civil liberties are to be commended, but often the wording is vague and open to interpretation and some pressing issues have been ignored completely. The devil will lie in the detail of the new Freedom Bill. It is to be hoped that the Lib Dems remain resolute during the drafting process and refuse to compromise their convictions in order to secure concessions in other areas of government policy.

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