



## Statewatch Analysis

### Six months on: An update on the UK coalition government's commitment to civil liberties

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## Part I: Introduction

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Within weeks of its formation in May 2010, the coalition government announced with much fanfare its intention “to restore the rights of individuals in the face of encroaching state power.” An easy victory over Labour’s politically bankrupt National Identity Scheme followed, but since then the government’s approach has been characterised by caution and pragmatism rather than an unerring commitment to liberty.

This is largely because there are splits within government on many of the key civil liberties issues that fundamentally define the relationship between citizen and state: how long and under what conditions can the government detain us, to what extent should the state surveil us, and what data on us should it hold? These internal divisions have been compounded by significant pressure from the civil service and security agencies to retain Labour policies that served to empower them.

## Part II: The proposed measures

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These are the specific commitments made by the coalition government in its May 2010 coalition agreement.<sup>1</sup>

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

Prior to the general election, the Conservatives said they would introduce a “great repeal bill” and the Lib Dems promised a “freedom bill.” Initially the coalition government signalled its intention to merge the two bills into one, but there will now be both. The Freedom Bill was announced to much trumpeting in the May 2010 coalition agreement. By contrast, the Repeal Bill was unveiled quietly in the Ministry of Justice Business Plan 2011-2015. It will be introduced in May 2012 following the completion of a review of existing legislation “to identify unnecessary laws and options for repeal.”<sup>2</sup>

The progress of the Freedom Bill has been somewhat muddled. On 1 July 2010, Nick Clegg launched the Your Freedom project, a “radically different approach” to civil liberties that would put “freedom under the spotlight in a way the previous government never did.” It would allow people to “have their say on where the state should step in, and where it should butt out” and accordingly “your views will shape directly the steps we take.”<sup>3</sup> The public was encouraged to submit their comments and ideas to the Your Freedom website, and over 46,000 did so before the consultation ended on 10 September. The next phase of the project involves processing the

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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> Ministry of Justice Business Plan 2011-2015: <http://www.justice.gov.uk/moj-business-plan2011-15-nov10.pdf>

<sup>3</sup> Nick Clegg website, 1.7.10:

[http://www.nickclegg.com/nccom\\_news\\_details.aspx?title=Nick\\_Clegg\\_delivers\\_speech\\_on\\_freedom\\_in\\_the\\_UK&pPK=d0bb085a-966a-4491-9982-95aaf8d02823](http://www.nickclegg.com/nccom_news_details.aspx?title=Nick_Clegg_delivers_speech_on_freedom_in_the_UK&pPK=d0bb085a-966a-4491-9982-95aaf8d02823)

estimated 14,000 ideas that were submitted to the website, all of which the government promised to consider.

In his speech to the Liberal Democrat conference on 20 September, Nick Clegg announced that the Freedom Bill would be published some time in November 2010. However, it soon became clear that this timescale was unrealistic. Control of the Bill was passed from the Cabinet Office to the Home Office amidst reports that the volume of information submitted by the public had proved to be unmanageable. The Daily Telegraph said that the bill will be truncated "into a much smaller civil liberties bill" without the deregulation measures that were originally included to help UK businesses.<sup>4</sup> On 8 November, the Home Office published a Business Plan 2011-2015 setting the date for the introduction of the Freedom Bill as February 2011.<sup>5</sup> The document also lists some of the issues the Bill will address:

*Introduce a Freedom Bill to reverse state intrusion, including:*

*a. Further regulating CCTV*

*b. Outlawing finger-printing of children at school without parental permission, working with the Department for Education*

*c. Changing criminal record checks and the Vetting and Barring Scheme, including ensuring that historical convictions for consensual gay sex with over-16s will be treated as spent and will not show up on criminal record checks*

*d. Adopting the protections of the Scottish model for the DNA database and publishing guidance on the application of rights to remove DNA from the database*

*e. Tackling rogue private sector wheel clampers by prohibiting the wheel clamping or towing away of vehicles on private land.*

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

### *Identity Cards*

Though the coalition government failed to abolish identity cards and the National Identity Register within its self-imposed 100 day deadline, the Identity Document Bill's passage through parliament has been relatively

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<sup>4</sup> The Telegraph, 6.11.10: <http://www.telegraph.co.uk/news/newstoppers/politics/nick-clegg/8114603/Nick-Clegg-abandons-red-tape-cutting-project.html>

<sup>5</sup> Home Office Business Plan 2011-2015: <http://www.homeoffice.gov.uk/publications/about-us/corporate-publications/business-plan-2011-15/business-plan?view=Binary>

smooth. To date, the only amendment has come from the House of Lords which, on 17 November 2010, voted by a majority of 220 to 188 to offer refunds to those who had voluntarily purchased an identity card. The Bill has now been returned to the House of Commons to consider this amendment.

NO2ID described the Bill as a “good start” but expressed grave concern over some sections of its drafting.

*The Bill, as drafted by Home Office officials, broadens further some of the already over-broad offences created by the 2006 Act, and worse, reintroduces some of the deeply flawed official conceptions of ‘identity’ inherent in the ID scheme - such as sentences of up to 2 years for quite legitimately, or accidentally through error or misprint, holding identity documents in more than one name.<sup>6</sup>*

Of greatest concern is clause 10 which re-enacts data-sharing powers that were created for identity cards, and applies them to passports. Section 9 of the *Identity Cards Act 2006* gave the Secretary of State the power to compel most public bodies to share information held on individuals in order to validate the authenticity of data submitted to the National Identity Register. These powers will now be used to check passport applications and assist with decisions over whether a passport should be withdrawn. Powers that previously applied only to the few thousand people who chose to purchase an ID card ahead of time will now affect millions of passport holders. Further, subsection 4 of clause 10 of the Identity Documents Bill extends this power to “certain credit reference agencies...or any person specified for the purposes in an order made by the Secretary of State.” NO2ID concludes that clause 10 “creates much broader data-sharing powers than the parallel ones in the 2006 Act...[and] is a huge enhancement of the database state and mass surveillance.”

### *Biometric Residence Permits*

On 9 June 2010, at the Bill’s second reading in the House of Commons, Home Secretary Theresa May confirmed that biometric residence permits (previously called “ID Cards for foreign nationals” by the Labour government) would continue to be issued to non-EEA nationals. She told the House to not “...be in any doubt. They are not ID cards.”<sup>7</sup> Similarly, Damian Green, minister for immigration, emphasised how “very different” these permits are from identity cards and insisted that the government is required to issue them by EU law (namely Council Regulation 380/2008).<sup>8</sup> However, the UK is not a signatory to the Schengen Agreement and as such is bound by

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<sup>6</sup> NO2ID press release, 9.6.10: <http://press.mu.no2id.net/2010-06/id-repeal-bill-a-good-start-but-bad-in-parts/>

<sup>7</sup> Parliament.uk website, 9.6.10: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100609/debtext/100609-0006.htm>

<sup>8</sup> The Guardian, 9.6.10: <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/09/id-cards-damian-green>

this law only because the Labour government opted into the measure. And while the Regulation requires member states to store a photograph of the holder of the permit along with a minimum of two fingerprints scans, Liberty has expressed concern that the UK has gone further and required visa applicants to provide “vast amounts of personal information...including now ten images of their fingerprints” and that this data “may be retained almost indefinitely.” NO2ID warns that biometric residence permits have allowed much of the infrastructure of the National Identity Scheme to remain intact and that “it would be straightforward to extend this [scheme] to the whole population should a future government accept the idea. The ID scheme is both cancelled and still alive.”

### *ContactPoint*

Meanwhile, the ContactPoint database - which held personal information on everyone under the age of 18 - was shut down on 6 August 2010 with all data scheduled to be destroyed within two months of this date. The Department for Children, Schools and Families website says: “We are exploring the practicality of a national signposting approach, which would focus on helping a strictly limited group of practitioners to find out whether a colleague elsewhere is working, or has previously worked, with the same vulnerable child.”<sup>9</sup>

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

This will be addressed by the Freedom Bill. A dual consent system is likely to be introduced under which both parent and child must give their approval before any fingerprints can be taken by a school. The children’s organisation Action on Rights for Children (ARCH) welcomed this proposal, but warned that the only guidance parents currently receive amounts to a “one-sided sales pitch” because it is provided by those selling the scheme to the school. ARCH has called on the government to commission research to provide parents and children with a balanced analysis of the use of biometric systems in schools, ensure that there is an easy mechanism for the withdrawal of consent at any time, and require schools that currently hold their students’ biometric records to seek retroactive consent from parents.<sup>10</sup>

In December 2010, the European Commission voiced its concern over the practice in a letter to the British government. It warned that the routine collection of biometric data in schools might breach the EU Data Protection Directive because it is not “proportionate” and cannot be challenged in court.

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<sup>9</sup> Department for Children Schools and Families website:

<http://www.dcsf.gov.uk/everychildmatters/strategy/deliveringservices1/contactpoint/contactpoint/>

<sup>10</sup> Action on Rights for Children Response to the Department for Education consultation on fingerprint use in schools:

[http://www.archrights.org.uk/index.php?option=com\\_phocadownload&view=category&download=18:p-p-2010&id=6&Itemid=23](http://www.archrights.org.uk/index.php?option=com_phocadownload&view=category&download=18:p-p-2010&id=6&Itemid=23)

*We should be obliged if you could provide us with additional information both regarding the processing of the biometric data of minors in schools, with particular reference to the proportionality and necessity in the light of the legitimate aims sought to be achieved, and the issue concerning the availability of judicial redress.*<sup>11</sup>

For now, fingerprint identification schemes continue to be rolled out, and some schools have begun to introduce facial recognition systems to register students' attendance (see section 10 on CCTV).<sup>12</sup>

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

According to the Ministry of Justice Business Plan work is already underway to "develop proposals and draft legislation to extend the Freedom of Information Act to more organisations." Proposals are scheduled to be published in March 2011 with legislation to follow in April 2011. According to the Ministry of Justice, the government plans to "proactively publish significant amounts of information". Speaking to the BBC on 7 September 2010, Lord McNally, the Minister of State for Justice, said:

*The Government is committed to increasing transparency, including extending the scope of the Freedom of Information Act. We are carefully considering the different ways of achieving this aim, including looking at the extension of the Act to additional bodies.*

In recent months the Information Commissioner, Christopher Graham, has been heavily criticised for his failure to take action against Google for violating the Data Protection Act by intercepting personal data from wireless home networks. In November 2010, it was revealed that since 2008 only one member of the Information Commissioner's Office has had formal training on internet/computer related crime.<sup>13</sup> Big Brother Watch concludes that "when it comes to policing privacy cases involving the technology sector, the Information Commissioner's office is simply not up to the job."<sup>14</sup>

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

It is now two years since the European Court of Human Rights ruled the UK's DNA retention regime to be illegal. The coalition government is legally

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<sup>11</sup> The Telegraph, 14.12.10: <http://www.telegraph.co.uk/news/worldnews/europe/eu/8202076/Europe-tells-Britain-to-justify-itself-over-fingerprinting-children-in-schools.html>

<sup>12</sup> Daily Mail, 5.10.10: <http://www.dailymail.co.uk/news/article-1317520/School-installs-9k-facial-recognition-cameras-stop-students-turning-late.html#ixzz11fL8J4ET>

<sup>13</sup> ConservativeHome website, 15.11.10: <http://conservativehome.blogs.com/centreright/2010/11/robert-halfon-mp-is-the-information-commission-fit-for-purpose.html>

<sup>14</sup> Big Brother Watch website, 15.11.10: <http://www.bigbrotherwatch.org.uk/home/2010/11/is-the-information-commissioner-fit-for-purpose.html>

obliged to implement this ruling and it is disappointing that action has yet to be taken. Changes will arrive in the Freedom Bill which will introduce the Scottish model of DNA retention. The Bill will also publish "guidance on the application of rights to remove DNA from the database." It is unclear whether people who are incorrectly on the database will automatically be removed or just be given the power to opt out. The Bill is unlikely to become law before late 2011 and until this time anyone arrested for any offence will continue to have a DNA sample taken. Alarming, there is also growing concern regarding the overrepresentation of individuals with mental health problems on the database.<sup>15</sup>

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

This issue is expected to be addressed by the Freedom Bill. Over the last six months there have been two notable developments.

In July 2010, the Lord Chief Justice emphasised in two Court of Appeal judgments that jury-less trial "remains and must remain the decision of last resort."<sup>16</sup> He also urged the police to handle issues of jury protection in a "realistic and proportionate way" and warned against the use of jury-less trial as an easy alternative to the arduous job of shielding juries from outside influence.

By contrast, in November 2010 Louise Casey, the independent Commissioner for Victims and Witnesses, argued that the right to jury trial in minor "either-way" criminal offences should be removed because it is expensive and time consuming. "Either-way" offences are those that can be heard in either a magistrates' court (before a panel of magistrates or a district judge) or the crown court (before a jury). Defendants are allowed to choose between the two, but Casey would have this right removed:

*We should not view the right to a jury trial as being so sacrosanct that its exercise should be at the cost of victims of serious crimes... Defendants should not have the right to choose to be tried by a jury over something such as the theft of a bicycle or stealing from a parking meter.<sup>17</sup>*

To the many people who believe that the right to trial by one's peers should be unquestionably sacrosanct, the notion that it should be eroded further in order to save money is unsavoury. Worse still, Casey, who has no legal qualifications, has been criticised for recognising "no difference between 'defendants' and 'offenders' (she uses the terms interchangeably) and, in doing so, entirely ignores another foundation of the English legal system:

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<sup>15</sup> Frontier Psychiatrist website, 8.9.10: <http://frontierpsychiatrist.co.uk/national-dna-database-and-psychiatric-patients/>

<sup>16</sup> UK Human Rights Blog, 26.7.10: <http://ukhumanrightsblog.com/2010/07/26/lord-chief-justice-bolsters-trial-by-jury/>

<sup>17</sup> BBC website, 3.11.10: <http://www.bbc.co.uk/news/uk-11680382>

the presumption of innocence.”<sup>18</sup> Given it has pledged to strengthen jury trial, it is to be hoped that the government will give these proposals short thrift.

### *7. “We will restore rights to non-violent protest.”*

Section 44 of the Terrorism Act 2000, which was routinely used to stop and search protesters, has been scrapped (see section 9 on the misuse of anti-terrorism legislation). While this is a welcome move, it should be noted that the government was legally obliged to implement the European Court of Human Rights’ January 2010 ruling that the police’s use of section 44 was unlawful. The real problem continues to lie in police practice and there is no reason to believe that the demise of section 44 alone will have a tangible impact on the hostile manner in which protesters are treated. The police are still afforded powers of stop and search under Section 1 of the Police and Criminal Evidence Act 1984, section 60 of the Criminal Justice and Public Order Act 1994 and section 43 of the Terrorism Act. While these powers cannot be invoked in the same arbitrary manner as section 44 was, in some situations they could be used in its place.

On 16 July 2010, peace protesters camping on Parliament Square lost their legal challenge against a high court judgment to evict them. At 2am on 20 July 2010, they were forcibly removed by 50 bailiffs. A Home Office Draft Structural Reform Plan published in July 2010 said that the Freedom Bill would “restore rights to non-violent protest, in particular by reviewing the current legislation governing protests around Parliament and making necessary changes.”<sup>19</sup> The government has yet to elaborate on this pledge.

Over the last six months the dubious operational practices and the scale of the volume of data collected and held by the police on political protesters has come sharply into focus. In June 2010, the Guardian revealed that on more than 80 occasions an 85-year-old peace protester’s activities have been systematically surveilled by the police’s National Public Order Intelligence Unit (NPOIU) and entered into a database of “domestic extremists.”<sup>20</sup> In July 2010, Criminal Intelligence Reports obtained by Fitwatch, showed how the NPOIU had logged comprehensive records of the speakers - which included Jeremy Corbyn MP and Fiyaz Mughal, Nick Clegg’s adviser on extremism - and attendees of a protest against the BBC’s decision to not broadcast an appeal for the victims of Israel’s offensive in Gaza.<sup>21</sup> And in January 2010, a Guardian investigation revealed that a Metropolitan police officer, Mark Kennedy, had worked undercover within the

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<sup>18</sup> Spiked website, 9.11.10: <http://www.spiked-online.com/index.php/site/article/9872/>

<sup>19</sup> Home Office Draft Structural Reform Plan, July 2010: <http://www.homeoffice.gov.uk/publications/about-us/corporate-publications/structural-reform-plan/pdf-version?view=Binary>

<sup>20</sup> The Guardian, 25.6.10: <http://www.guardian.co.uk/uk/2010/jun/25/peace-campaigner-classified-domestic-extremist>

<sup>21</sup> Fitwatch was formed in 2007 in response to the increasing use of Metropolitan police Forward Intelligence Teams. See: Fitwatch website, 1.7.10: <http://www.fitwatch.org.uk/2010/07/01/fitwatch-reveals-new-evidence-of-police-data-gathering/>



environmental protest movement for seven years between 2003 and 2010.<sup>22</sup> In this time he infiltrated dozens of protest groups and allegedly acted as an agent provocateur by organising and financing demonstrations.

A thorough review of the clandestine surveillance and intelligence-gathering activities of police at political protests is urgently required.

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

On 9 July 2010, during the second reading debate of Lord Lester's private member's Defamation Bill, Justice Minister Lord McNally announced that the government would publish a Bill to reform the libel laws to ensure that "a fair balance is struck between freedom of expression and the protection of reputation." He made clear that this was not a "vague promise" but a "firm commitment to act on this matter." He told the House:

*We recognise the concerns raised in recent months about the detrimental effects that the current law may be having on freedom of expression - particularly in relation to academic and scientific debate, the work of non-governmental organisations and investigative journalism.<sup>23</sup>*

In January 2011, Nick Clegg confirmed that new legislation would also address libel tourism and the shortcomings of existing laws to deal with internet publication. He said: "Our aim is to turn English libel laws from an international laughing stock to an international blueprint."<sup>24</sup> Work on a draft Defamation Bill is currently underway and is scheduled to be published in March 2011. According to the Ministry of Justice Business Plan 2011-2015 a consultation will then take place and once amendments have been made the Bill will be introduced to parliament in May 2012.

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

*Regulation of Investigatory Powers Act (RIPA)*

Speaking in the House of Commons on 13 July 2010, Theresa May announced a review of current counter-terrorism legislation. This included a commitment to re-evaluate the use of the Regulation of Investigatory Powers Act by local authorities. It is expected that local councils will have their RIPA powers curtailed as promised in the coalition agreement.

In August 2010, in a potentially landmark ruling, the Investigatory Powers Tribunal ruled that Poole council's near three week surveillance of a family was unlawful. Council workers had covertly monitored the family to determine whether they had lied about living in the catchment area of a

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<sup>22</sup> The Guardian, 9.1.11: <http://www.guardian.co.uk/uk/2011/jan/09/undercover-office-green-activists>

<sup>23</sup> Press Gazette website, 12.7.10: <http://www.pressgazette.co.uk/story.asp?storycode=45686>

<sup>24</sup> Cabinet Office website, 7.1.11: <http://www.dpm.cabinetoffice.gov.uk/news/civil-liberties-speech>

local primary school. This was the first time RIPA had been challenged in an open hearing. The tribunal ruled that the surveillance was “not proportionate and could not reasonably have been believed to be proportionate” and that the council had therefore breached the family’s right to privacy under the Human Rights Act.<sup>25</sup>

#### *Section 44*

On 8 July 2010, the Home Secretary, Theresa May, announced that police will no longer be able to use section 44 of the Terrorism Act 2000 to stop and search members of the public, only vehicles. On 30 June 2010, the European Court of Human Rights had ruled that their January 2010 judgment in the case of Gillan and Quinton v. the United Kingdom was final. And on 4 July 2010, a Human Rights Watch report confirmed that none of the approximately 450,000 people subjected to section 44 stop and searches between April 2007 and April 2009 had been successfully prosecuted for a terrorism related offence.<sup>26</sup> Similarly, in October 2010, Home Office statistics revealed that none of the 101,248 people police had used section 44 powers against in 2009 were arrested for a terrorism offence.<sup>27</sup>

May announced the introduction of “interim measures [that] will bring section 44 stop and search powers fully into line with the European Court’s judgment.”<sup>28</sup> Police now have to rely on section 43 of the Act which, unlike section 44, requires them to demonstrate reasonable suspicion that a person is involved in terrorist activity before stopping and searching them. Section 44 could be used only in prescribed “authorisation zones”, but section 43 can be invoked anywhere in the country. Previously, police had been able to use section 44 in place of section 43 by creating “authorisation zones” that covered vast geographical areas. This had allowed them to bypass the need for reasonable suspicion.

The demise of section 44 is to be welcomed but there remains cause for concern. Firstly, the government will likely face a stern challenge to ensure that section 43 powers do not come to be routinely misused in much the same way. Section 44 has been used on a grand scale and accordingly has attracted more negative publicity, but there is also evidence that section 43 has been dubiously employed. For example, on 6 June 2010, police decided that a photographer taking pictures of cadets near Buckingham Palace should be detained under section 43.<sup>29</sup> If incidents such as this become entrenched within common police practice the damage can be long-lasting. Over the last few years government bodies have displayed a frequent

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<sup>25</sup> The Guardian, 2.8.10: <http://www.guardian.co.uk/education/2010/aug/02/school-catchment-spying>

<sup>26</sup> Human Rights Watch website, 4.7.10: <http://www.hrw.org/en/news/2010/07/02/uk-terrorism-search-power-violates-rights>

<sup>27</sup> BBC website, 28.10.10: <http://www.bbc.co.uk/news/uk-11642649>

<sup>28</sup> Home Office website, 8.7.10: <http://www.homeoffice.gov.uk/publications/parliamentary-business/oral-statements/stop-and-search-statement/?view=Standard&pubID=821759>

<sup>29</sup> British Journal of Photography website, 6.7.10: <http://www.bjp-online.com/british-journal-of-photography/news/1721000/young-photographer-detained-section-terrorism-act>

inability to rectify the police's misuse of section 44 powers despite regularly publishing guidance on the legislation.

Secondly, it has taken less than six months for the police to ask that the authority be returned to them to search individuals without reasonable suspicion. Senior officers have reportedly told the government that they believe this power to be essential to the effective policing of large public events like the Olympics and political summits such as the G20.<sup>30</sup> According to the Guardian these 'new' powers would be restricted to a designated location for a specific period of time. This is exactly how section 44 was supposed to be used. The police appear to be asking for section 44 powers to be repackaged and reintroduced and are assuring that they will not abuse them this time.

#### *10. "We will further regulate CCTV."*

The Home Office's July 2010 Draft Structural Reform Plan says that the Freedom Bill will "further regulate CCTV, including Automatic Number Plate Recognition, to ensure that its use is proportionate and retains public confidence." In the same month the Home Office confirmed that the UK's ANPR camera system will be placed under statutory regulation. Home Office minister, James Brokenshire, said "Both CCTV and ANPR can be essential tools in combating crime, but the growth in their use has been outside of a suitable governance regime." The Guardian reported that:

*The options being looked at by the Home Office for regulating the system...include establishing a lawful right for the police to collect and retain such details as well as defining who can gain access to the database and placing a legal limit on the period information can be stored for.*<sup>31</sup>

Regulation could not come too soon. Responding to a freedom of information request in June 2010, the National Policing Improvement Agency revealed that the National ANPR Data Centre now holds over 7.6 billion records in its database. Big Brother Watch points out that this equates to around 200 surveilled journeys for every motorist in the UK.<sup>32</sup> Use of the technology continues to grow. In July, the Police Service of Northern Ireland was given £13 million to spend on an ANPR system.<sup>33</sup> The decision to introduce regulation comes largely in response to the public outrage that followed the introduction of ANPR cameras in a predominantly Muslim area of Birmingham as part of "Project Champion". On 30 September 2010, a review of the scheme, conducted by Thames Valley Police, found there to

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<sup>30</sup> The Guardian, 29.12.10: <http://www.guardian.co.uk/uk/2010/dec/29/police-stop-and-search-powers>

<sup>31</sup> The Guardian, 4.7.10: <http://www.guardian.co.uk/uk/2010/jul/04/anpr-surveillance-numberplate-recognition>

<sup>32</sup> Big Brother Watch website, 17.6.10: <http://www.bigbrotherwatch.org.uk/home/2010/06/76-billion-journeys-logged-on-the-anpr-database.html>

<sup>33</sup> Belfast Telegraph, 1.7.10: <http://www.belfasttelegraph.co.uk/news/local-national/police-get-pound13m-number-plate-tracker-14860388.html>

be “little evidence of thought being given to compliance with the legal or regulatory framework.” Further:

*The consultation phase was too little too late, and the lack of transparency about the purpose of the project has resulted in significant community anger and loss of trust. As one community leader stated to the Review Team, “this has set relations [with the police] back a decade.”<sup>34</sup>*

On 18 October, Liberty threatened West Midlands Police force with judicial review if a commitment to remove all Project Champion cameras was not given within 14 days.<sup>35</sup> On 2 December, West Midlands Police confirmed that the £3 million scheme would be dismantled at a cost of £630,000.<sup>36</sup>

Unfortunately, such waste of public money is not uncommon. On 30 November, Big Brother Watch published a report revealing that 336 local councils have spent over £314 million on installing and operating CCTV cameras between 2007 and 2010.<sup>37</sup> Accordingly, “the UK spends more per head on CCTV coverage than 38 countries do on defence.”

In July 2010, Big Brother Watch also revealed that 54 CCTV smart cars, operating in 25 local councils, caught and fined at least 188,000 motorists between April 2009 and March 2010 generating over £8 million in fines.<sup>38</sup> The cars are equipped with a 12 foot mast with a camera attached and are deployed under the guise of monitoring road safety. Announcing the organisation’s findings, the Campaign Director of Big Brother Watch, Dylan Sharp, said:

*The CCTV Smart car represents a very dangerous escalation in Britain’s surveillance society. The vehicles are sent out to catch people and make money, with road safety only an afterthought. £8 million is an eye-watering amount to take in fines in just 25 councils. It is surely only a matter of time before more councils start using these cars. The Coalition Government must act now and prevent that from happening.*

Another revenue stream may soon come in the form of average speed cameras which are currently being trialled by Transport for London to enforce 20mph zones. The cameras work by recording a vehicle at two fixed points on a road and estimating its average speed and are considered to be

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<sup>34</sup> Thames Valley Police Project Champion Review, 30.9.10: [http://www.west-midlands.police.uk/latest-news/docs/Champion\\_Review\\_FINAL\\_30\\_09\\_10.pdf](http://www.west-midlands.police.uk/latest-news/docs/Champion_Review_FINAL_30_09_10.pdf)

<sup>35</sup> Liberty press release, 18.10.10: <http://www.liberty-human-rights.org.uk/media/press/2010/liberty-demands-removal-of-unlawful-birmingham-surveillance.php>

<sup>36</sup> BBC website, 2.12.10: <http://www.bbc.co.uk/news/uk-england-birmingham-11901236>

<sup>37</sup> Big Brother Watch report: The Price is Wrong, 30.11.10: <http://www.bigbrotherwatch.org.uk/files/big-brother-watch-report---price-is-wrong-29-11-10-final-2.pdf>

<sup>38</sup> Big Brother Watch website, 7.7.10: <http://www.bigbrotherwatch.org.uk/home/2010/07/driveby-spies-cctv-cars-issue-8-million-in-fines-in-just-12-months.html>

more reliable than traditional speed cameras. All recorded data would be sent to the National ANPR Data Centre.<sup>39</sup>

Other alarming developments that illustrate the need for greater CCTV regulation include the introduction of a scheme called Sigard in Coventry city centre. This intrusive system works by attaching powerful microphones to CCTV cameras in order to monitor private conversations. It is accurate up to 100 yards and attempts to detect “suspect sounds, including trigger words spoken at normal volumes as well as angry or panicked exchanges before they become violent.”<sup>40</sup> Police are then called to the scene by the system’s operators.

On 4 October, the website “Internet Eyes” began streaming live CCTV feeds from businesses and shop owners to its subscribers over the internet. For an annual membership fee of £12.99 users can view up to four streams at any time and click an alert button if they see “suspicious activity.” Alerts cause an SMS message to be sent automatically to the owner of the CCTV camera (the website’s customer) along with a screenshot of the video feed. Users are awarded points on the basis of how helpful their alert is that can be converted into cash prizes.

In July 2010, investigations into the January 2009 Gaza protests in London uncovered alarming evidence of police manipulation of CCTV footage. Two charges of violent conduct against demonstrator Jake Smith were dropped after it was revealed that footage of him attending the demonstration had been edited to suggest that another man throwing a stick at police was him. Events were shown out of sequence and images of him being assaulted by a police officer and left lying on the floor were cut entirely. His solicitor, Matt Foot, warned “We should be both curious and suspicious about how the police use CCTV footage in these cases.”<sup>41</sup>

And in July 2010, a study by the University of Hull warned of the damaging effect of surveillance in schools. “The children we have talked to in this paper are treated as suspects on a regular basis and we have to ask what effect that is going to have on children’s relationships with adults.”<sup>42</sup> In September 2010, it was revealed that half of York’s secondary schools have been filming pupils on CCTV without notifying parents.<sup>43</sup>

In his November 2010 report to parliament on the state of surveillance, the Information Commissioner, Christopher Graham, warned of increasingly intrusive surveillance. This includes the use of unmanned drones, workplace monitoring of employees by global positioning systems and the analysing of

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<sup>39</sup> This is London website 18.8.10: <http://www.thisislondon.co.uk/standard/article-23868475-hundreds-of-speed-cameras-to-enforce-20mph-zones.do>

<sup>40</sup> The Sunday Times, 20.6.10

<sup>41</sup> The Guardian, 19.7.10: <http://www.guardian.co.uk/commentisfree/2010/jul/19/gaza-protests-inquiry-police-cctv>

<sup>42</sup> The Telegraph, 7.7.10: <http://www.telegraph.co.uk/education/educationnews/7874818/CCTV-turning-schools-into-prisons.html>

<sup>43</sup> The York Press, 13.7.10: [http://www.yorkpress.co.uk/news/8388267.Fears\\_over\\_CCTV\\_use\\_in\\_York\\_schools/](http://www.yorkpress.co.uk/news/8388267.Fears_over_CCTV_use_in_York_schools/)

data from social networking sites. He said that since 2006 “visual, covert, database and other forms of surveillance have proceeded apace and that it has been a challenge for regulators who often have limited powers at their disposal, to keep up.” The report calls for legal reform:

*Surveillance cannot be effectively constrained without a more rigorous regime of law, supervision and enforcement. The enactment of positive legislation to create or to reform the regulation of surveillance activities where it is absent or deficient must play an important part in the near future.*<sup>44</sup>

It is to be hoped that whatever regulation the coalition government plans to introduce is up to the task.

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

Buried in the ‘Terrorism’ subsection of the government’s October 2010 Strategic Defence and Security Review is a commitment to:

*Introduce a programme to preserve the ability of the security, intelligence and law enforcement agencies to obtain communication data and to intercept communications within the appropriate legal framework. This programme is required to keep up with changing technology and to maintain capabilities that are vital to the work these agencies do to protect the public...We will legislate to put in place the necessary regulations and safeguards to ensure that our response to this technology challenge is compatible with the Government’s approach to information storage and civil liberties.*<sup>45</sup>  
(emphasis added)

The government has been heavily criticised for backtracking on its promise to “end the storage of internet and email records without good reason” - though this vague wording had left them with ample room for manoeuvre. In reality it was clear six months ago that the UK’s legal obligation to implement the EU Data Retention Directive would greatly restrict the new government’s capacity to abandon Labour’s data retention regime. That said, it is immensely disappointing that instead of moving the practice in line with the minimum standards required by the Directive (for example by reducing the length of time data is held to six months), the government appears to be heading in the opposite direction.

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<sup>44</sup> Information Commissioner’s report to Parliament on the State of Surveillance, November 2010: [http://www.ico.gov.uk/~media/documents/library/Corporate/Research\\_and\\_reports/surveillance\\_report\\_for\\_home\\_select\\_committee.ashx](http://www.ico.gov.uk/~media/documents/library/Corporate/Research_and_reports/surveillance_report_for_home_select_committee.ashx)

<sup>45</sup> Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review, October 2010: [http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/documents/digitalasset/dg\\_191634.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191634.pdf)

It is worth emphasising that the ability to “obtain” communication data is entirely distinct from the ability to “intercept” the contents of communications. Communication data is traffic data and includes times, dates, phone numbers, faxes, email addresses and website visits. It should not reveal the content of what was said or written.<sup>46</sup> Communications Service Providers (CSPs) automatically retain this data for their own purposes and public authorities can gain access to it through RIPA (see below). However, in recent years there has been a rapid growth in the British public’s use of third-party internet services, such as Gmail, Skype, Facebook and Twitter - what the Strategic Defence and Security Review refers to as “changing technology”. Data from these websites and computer software is not retained by CSPs. The Government Communications Headquarters spearheaded the £2 billion Interception Modernisation Programme (IMP) under the Labour government in order to furnish the UK intelligence services with communications data from these new sources and it now appears that the coalition government has bowed to pressure and revived a scheme that both parties criticised in opposition.

Were it to be introduced, the IMP would instantly blur the boundaries between access to communication data and access to the content of communications. This is because the only way that data from third-party services can be collected is by intercepting the content of the communication using ‘deep packet inspection’ technology. The desired communication data would then have to be extracted before it could be logged in a database, and the content ignored. A practice that currently requires a warrant from the Home Secretary would be conducted by CSPs on a routine basis. A London School of Economics briefing on the IMP questions whether this form of “blanket warranting” would comply with UK and EU law. It would also cause a sea change in the role of CSPs. Currently their contribution to intercepting communications is “passive” insofar as they do “nothing until a warrant is received.” Under the IMP they would be obliged to adopt a pre-emptive role by “actively looking at the content.” As the LSE briefing stresses, what is being considered is very much a “new form of data collection” and the wisdom of placing responsibility for its operation in the hands of private companies is highly questionable.<sup>47</sup> ISPs have been shown to have trawled through their subscribers’ web browsing history in order to subject them to targeted advertising (see below). How would the government be able to reliably ensure that every CSP would comply with the Data Protection Act and handle responsibly the mountain of data they would be charged with intercepting?

During Prime Minister’s Question Time, on 27 October, David Cameron was asked to “reassure the House that the Government have no plans to revive Labour’s intercept modernisation programme, whether in name or in function.” His response was evasive:

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<sup>46</sup> However, if an individual’s internet usage is recorded the communication data and the content of the communication are indistinguishable: the website address alone reveals the content.

<sup>47</sup> LSE briefing on the Interception Modernisation Programme, June 2009: [http://www.lse.ac.uk/collections/informationSystems/research/policyEngagement/IMP\\_Briefing.pdf](http://www.lse.ac.uk/collections/informationSystems/research/policyEngagement/IMP_Briefing.pdf)

*I would argue that we have made good progress on rolling back state intrusion in terms of getting rid of ID cards and in terms of the right to enter a person's home. We are not considering a central Government database to store all communications information, and we shall be working with the Information Commissioner's Office on anything we do in that area.*<sup>48</sup>

That vast quantities of communications data should not be stored in a single, massive database is a conclusion the IMP's architects had reached 18 months ago. The government's message is confused. In November 2010, the Home Office Business Plan 2011-2015 stated that it would "develop and publish proposals for the storage and acquisition of internet and e-mail records" as a means to "end the storage of internet and email records without good reason."

A reminder - if one is needed - of just how easily data stored under the IMP would be accessed came in July 2010 when the Interception of Communications Commissioner, Sir Paul Kennedy, published his annual report. It found that in 2009 public authorities - in the vast majority of cases the police - had used powers afforded to them by RIPA to make 525,130 requests to CSPs to access retained communications data.<sup>49</sup>

Worryingly, in September 2010, the European Commission referred the UK to the European Court of Justice for its improper implementation of the EU Data Protection Directive. This followed an investigation into complaints made by members of the public over BT's secret trialling of internet advertising software, made by the US company Phorm, without its subscribers' permission in 2006 and 2007.<sup>50</sup> In November, the government responded by launching a consultation into the way lawful interceptions are made under RIPA. Intercepting communications under RIPA requires a warrant from the Secretary of State unless both the sender and intended recipient have consented to the interception or "the person carrying out the interception 'has reasonable grounds for believing' that consent has been given."<sup>51</sup> This margin for interpretation has been abused by ISPs to infer "complied consent" where none exists.

The government has been criticised for failing to publicise the consultation adequately and for its mere four week duration (the Code of Practice on Consultation recommends a minimum length of 12 weeks).<sup>52</sup> To make matters worse, the email address included in the consultation document was

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<sup>48</sup> Parliament.uk website, 27.10.10:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101027/debtext/101027-0001.htm>

<sup>49</sup> Report of the Interception of Communications Commissioner for 2009: <http://www.official-documents.gov.uk/document/hc1011/hc03/0341/0341.pdf>

<sup>50</sup> PC Pro website, 30.9.10: <http://www.pcpro.co.uk/news/broadband/361564/bts-phorm-trial-lands-uk-government-in-court>

<sup>51</sup> Regulation of Investigatory Powers Act 2000: Proposed Amendments Affecting Lawful Interception: <http://www.homeoffice.gov.uk/publications/consultations/ripa-effect-lawful-intercep/ripa-amend-effect-lawful-incep?view=Binary>

<sup>52</sup> Code of Practice on Consultation: <http://www.berr.gov.uk/files/file47158.pdf>



incorrect. In light of this, the deadline for submissions was pushed back from 7 December to 17 December. The Open Rights Group, NO2ID, Privacy International, ARCHRights, Justice and Genewatch sent a joint letter to the Home Office to express their concern regarding the inadequacies of the consultation process. Having initially refused to discuss the issue with civil society groups, on 29 November the Home Office softened its stance and agreed to meet with them.<sup>53</sup>

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

On 30 July 2010, the Ministry of Justice announced that a Gateway has been created to scrutinise all legislation that contains criminal offences. "Justice Secretary Kenneth Clarke will examine proposals that would create criminal offences to ensure that they are justified and proportionate."<sup>54</sup>

*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 Ministry of Justice Business Plan 2011-2015 says a commission will be established "to investigate the creation of a UK Bill of Rights, working with [the] Cabinet Office to agree its scope and timetable" by December 2011. This lax timescale indicates that addressing an issue that is invariably divisive and contentious within the coalition government is not high on the agenda.

The Human Rights Act looks increasingly safe from repeal. On 21 September 2010, Lord McNally, the Minister of State for Justice, told the Lib Dem annual conference:

*We are also looking at the Human Rights Act - not to see how we can diminish it, but so that we have it better understood and appreciated. And let us be clear: The European Convention on Human Rights, coming up to its 60th anniversary, is not "someone else's law". It was never imposed on Britain. In fact, Britain was the first country to ratify the Convention - and with good reason.<sup>55</sup>*

Writing in the Guardian on 21 November, he insisted that: "There is no contradiction in being a supporter of the convention and at the same time

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<sup>53</sup> Open Rights Group website, 29.11.10: <http://www.openrightsgroup.org/blog/2010/home-office-concedes-to-meeting>

<sup>54</sup> Ministry of Justice website, 30.7.10: <http://www.justice.gov.uk/news/announcement300710b.htm>

<sup>55</sup> Liberal Democrats website, 21.9.10:

[http://www.libdems.org.uk/latest\\_news\\_detail.aspx?title=Lord\\_McNally%E2%80%99s\\_speech\\_to\\_Conference\\_&pPK=bb39bc08-99f0-4697-9eec-ad6d8484fe87](http://www.libdems.org.uk/latest_news_detail.aspx?title=Lord_McNally%E2%80%99s_speech_to_Conference_&pPK=bb39bc08-99f0-4697-9eec-ad6d8484fe87)

wanting to re-examine the way we give effect to it in the UK courts via the Human Rights Act 1998.”<sup>56</sup>

In August 2010, Lord Hope, the Deputy President of the UK Supreme Court, affirmed that repealing the act would make little discernable difference to the way rights are enforced in British courts. He highlighted the importance of the decision, made in 1966, to allow individuals to bring cases against the government for non compliance with the European Convention on Human Rights. Before this time action could only be taken by other member states. He said:

*...if you were to take away the Human Rights Act now, all that jurisprudence is there...And the right of individual petition will be there. And we will still have to recognise that if we take a decision which is contrary to the human rights convention, somebody is going to complain to Strasbourg and that may cause trouble for the UK. So it's very difficult to see how simply wiping out the Human Rights Act is really going to change anything until we withdraw from the convention - which, personally, I don't think is conceivable.*<sup>57</sup>

If a Bill of Rights is eventually introduced it will almost certainly serve to supplement the HRA rather than replace it. As mentioned in Statewatch's June 2010 analysis of the coalition agreement, this could be no bad thing.

### Part III: What other reforms are needed?

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#### 14. The “database state”

ContactPoint has been abolished and the National Identity Register soon will be, but the “database state” is alive and well. The surveillance culture endemic within the Home Office and intelligence services is durable and continues to shape government policy. As NO2ID points out:

*Challenging the authoritarian thinking behind the ID scheme was always going to be much tougher than defeating ID cards...We are still seeing 'new' bureaucratic projects that simply re-package the same mass-surveillance concepts.*<sup>58</sup>

A recent example of this is the Cabinet Office's “National Identity Assurance Service” under which “ideas are being sought from some of the same companies and agencies that would have built the ID scheme.”

Meanwhile, cases of public sector employees abusing their right to access government databases continue to mount. In August, the Northern Ireland

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<sup>56</sup> The Guardian, 21.11.10: <http://www.guardian.co.uk/commentisfree/libertycentral/2010/nov/21/convention-human-rights-britain-coalition>

<sup>57</sup> Law Society Gazette, 5.8.10: <http://www.lawgazette.co.uk/opinion/joshua-rozenberg/are-supreme-court-justices-more-assertive-they-were-law-lords>

<sup>58</sup> NO2ID Newsletter No. 158: <http://newsletters.mu.no2id.net/2010-09/newsletter-no-158>

Department for Social Development revealed that since January 2007 it had disciplined 45 employees for accessing personal records stored by the Department for Work and Pensions. Their Customer Information System is the largest citizen database in the UK and was found to be "almost certainly illegal under human rights or data protection law" by a Joseph Rowntree Reform Trust report.<sup>59</sup> A total of 225 UK public sector employees have now been found to have utilised the database unlawfully, but some government departments have refused to provide figures on their staff so the total is likely to be much higher.<sup>60</sup> In November 2010, a Police Community Support Officer pleaded guilty to illegally obtaining information by using the police national computer to investigate potential suitors. She used the database to see what property and cars they owned, whether they had any criminal convictions and even checked up on their relatives.<sup>61</sup>

The much criticised Summary Care Record system (SCR) - which the coalition had pledged to scrap - is open to similar abuse. In March 2010, a Big Brother Watch report showed that it allows 100,000 non-medical NHS staff to have access to patient records.<sup>62</sup> The dangers of this are becoming readily apparent. In June, it was revealed that more than 800 patient records are lost every day by NHS staff.<sup>63</sup> And in September, an NHS IT manager pleaded guilty to accessing patients' records on 431 occasions, including those of his friends, family and colleagues.<sup>64</sup>

In July 2010, the British Medical Association (BMA) called for access to patient data to be restricted to those actively involved in their treatment. The organisation's General Practitioners Committee passed a motion arguing that "...in view of the risks to patient safety caused by the failures of SCRs to be reliably and consistently updated, access to existing SCRs should be immediately suspended by the government."<sup>65</sup> In 2005 a report by the Foundation for Information Policy Research had reached a similar conclusion:

*...no one in central government - whether ministers, DoH officials or NHS central managers - should have access to identifiable health information on the whole UK population. This is backed up by studies*

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<sup>59</sup> Database State, p. 2: <http://www.jrrt.org.uk/uploads/Database%20State.pdf>

<sup>60</sup> Computer Weekly website, 25.8.10: <http://www.computerweekly.com/Articles/2010/08/25/242514/More-than-200-public-sector-staff-caught-snooping-on-citizen.htm>

<sup>61</sup> The Daily Mail, 4.11.10: <http://www.dailymail.co.uk/news/article-1326619/Female-PCSO-trawled-police-records-check-potential-lovers.html>

<sup>62</sup> Big Brother Watch website, 25.3.10: <http://www.bigbrotherwatch.org.uk/home/2010/03/broken-records-100000-hospital-administrators-porters-and-it-staff-able-to-access-confidential-medic.html>

<sup>63</sup> Daily Mail website, 25.6.10: <http://www.dailymail.co.uk/news/article-1289629/NHS-loses-800-patients-private-files-day.html>

<sup>64</sup> This is Hull & East Riding website, 16.9.10: <http://www.thisishullandeastriding.co.uk/news/NHS-manager-Dale-Trever-snooped-patients-medical-records/article-2648839-detail/article.html>

<sup>65</sup> NO2ID press release, 27.7.10: <http://press.mu.no2id.net/2010-07/lansley-must-keep-coalition-promise-and-halt-unsafe-summary-care-records/>

*showing that although patients trust their carers with medical information, the majority do not trust NHS administrators.*<sup>66</sup>

As of 2 December 2010, 3,910,804 SCRs have been created - over twice as many as when the coalition government came to power. A process of opting out exists, but has been criticised for being overly complex and poorly publicised. Patients are sent a single letter informing them that they can exclude themselves from the system by completing and submitting a form to their GP. Over 30 million people have received this letter, but in an estimated 88% of cases the recipient either discarded it unread or cannot remember reading it. This has resulted in an opt-out rate of 1.15%.<sup>67</sup> Clearly the government has not delivered on its coalition agreement pledge to "put patients in charge of making decisions about their care, including control of their health records." In August 2010, the NHS announced that "All new mailings of letters informing patients about the Summary Care Record have been paused."<sup>68</sup>

In October 2010, following a review by the Department of Health, Health Minister Simon Burns announced that information held on the database would "only contain demographic details, medications, allergies and adverse reactions." The BMA welcomed this apparent scaling back of the system but stressed that "much will depend on the way the amended scheme is put into practice."<sup>69</sup>

## 15. The Digital Economy Act

The DEA came into force on 8 June 2010, although the measures that deal with copyright infringement were not scheduled to come into effect before January 2011. Their introduction has been delayed by the high court's decision, on 10 November, to grant a judicial review of the Act's provisions. The case was brought in July by BT and TalkTalk, two of the UK's largest ISPs. They argue that the Act will infringe internet users' "basic rights and freedoms" and that it was subjected to "insufficient scrutiny" by parliament. Their motives are also financial. Ofcom's draft code of practice for the Act, published in May, only applies to ISPs with over 400,000 subscribers. BT and TalkTalk argue that this will put them at an unfair business disadvantage because some of their customers might choose to join smaller ISPs in order to avoid being monitored. They are also fearful of "investing tens of millions of pounds in new systems and processes only to find later that the Act is unenforceable."<sup>70</sup>

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<sup>66</sup> See: <http://www.cl.cam.ac.uk/~rja14/fiprmedconf.html>

<sup>67</sup> Smart Healthcare website, 15.6.10: <http://www.smarthealthcare.com/trisha-greenhalgh-summary-care-records-problematic-15jun10>

<sup>68</sup> NO2ID press release, 16.8.10: <http://press.mu.no2id.net/2010-08/millions-stay-cheated-of-privacy-as-government-hushes-medical-records-scandal/>

<sup>69</sup> EHI website, 11.10.10: [http://www.e-health-insider.com/news/6308/summary\\_care\\_record\\_given\\_go-ahead](http://www.e-health-insider.com/news/6308/summary_care_record_given_go-ahead)

<sup>70</sup> BT press release, 8.7.10: <http://www.btplc.com/News/Articles/Showarticle.cfm?ArticleID=98284B3F-B538-4A54-A44F-6B496AF1F11F>

The high court granted a judicial review on all four of their contested legal points, namely: that the European Commission was not given enough time to scrutinise the Act; that the Act does not comply with EU privacy laws; that the Act does not comply with EU e-commerce laws; and that the Act's provisions are "disproportionate" because they infringe, among other things, rights to privacy and freedom of expression afforded by the UK Human Rights Act and the free movement of services provided for by the Treaty on the Functioning of the European Union.<sup>71</sup> TalkTalk's executive director of strategy and regulation, Andrew Heaney, said:

*The provisions to try to reduce illegal file-sharing are unfair, won't work and will potentially result in millions of innocent customers who have broken no law suffering and having their privacy invaded...We look forward to the hearing to properly assess whether the Act is legal and justifiable and so ensure that all parties have certainty on the law before proceeding.*<sup>72</sup>

The hearing of the review is expected to take place in February 2011. If the high court rules in favour of BT and TalkTalk, the copyright provisions contained in sections 3 to 18 of the Act could be quashed.

## 16. Anti-social behaviour legislation

On 28 July 2010, the Home Secretary, Theresa May, said that it is "time to move beyond the ASBO."<sup>73</sup> Government statistics published that month revealed that the number of ASBOs being issued continues to fall and that 55% of ASBO recipients have breached their order. Further, if an ASBO is breached, it is breached an average of 4.2 times. May argued that Labour's centralised "top-down, bureaucratic, gimmick-laden approach" to inherently local issues became part of the problem rather than the solution. She called for a "complete change in emphasis, with communities working with the police and other agencies to stop bad behaviour escalating that far."

The rhetoric is encouraging, but over four months later we have yet to be provided with any details as to what a "move beyond the ASBO" will entail. The coalition government has given no indication that it intends to repeal any of the raft of anti-social behaviour legislation introduced by Labour. And though ASBOs are no longer in the media spotlight, they continue to be issued on a routine basis across the country. For now, the UK's ASBO regime remains in place.<sup>74</sup>

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<sup>71</sup> Statement of Facts and Grounds:

<http://www.btplc.com/newsadmin/attachments/statement%20of%20facts%20and%20grounds.pdf>

<sup>72</sup> The Telegraph, 10.11.10:

<http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/telecoms/8124356/TalkTalk-and-BT-win-review-of-online-piracy-law.html>

<sup>73</sup> Home Office website, 28.7.10: <http://www.homeoffice.gov.uk/media-centre/news/moving-beyond-asbos>

<sup>74</sup> For more information on the use of ASBOs see Statewatch's ASBOwatch: <http://www.statewatch.org/asbo/ASBOwatch.html>

## 17. Counter-terrorism legislation

On 24 June 2010, Home Secretary Theresa May announced that the government would support a six month renewal of the 28 day pre-charge detention limit for terrorism related offences pending an examination of the UK's counter-terrorism laws. On 13 July, a "rapid review" into six areas of "key counter-terrorism and security powers" was announced, covering:

- *the use of control orders*
- *stop and search powers in section 44 of the Terrorism Act 2000 and the use of terrorism legislation in relation to photography*
- *the detention of terrorist suspects before charge*
- *extending the use of deportations with assurances to remove foreign nationals from the UK who pose a threat to national security*
- *measures to deal with organisations that promote hatred or violence*
- *the use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities, and access to communications data more generally.*<sup>75</sup>

May called for the introduction of a "counter-terrorism regime that is proportionate, focused and transparent. We must ensure that in protecting public safety, the powers which we need to deal with terrorism are in keeping with Britain's traditions of freedom and fairness." The appointment of a long-standing critic of Labour counter-terrorism legislation, Lib Dem peer Lord Ken Macdonald QC, to provide independent oversight of the review served to engender optimism among the scheme's detractors.

However, it has become increasingly clear how divisive this issue is for the coalition government. Writing in *The Observer* on 31 October, Andrew Rawnsley said that the review's conclusions were due in September, but have been delayed twice because "an intense internal battle...is dividing the intelligence services, splitting the cabinet and has left David Cameron and Nick Clegg in a state of alarmed semi-paralysis."

*Ms May went to Number 10 a fortnight ago for a difficult meeting with David Cameron and Nick Clegg. When she revealed that they had hit this impasse, both men were horrified. David Cameron told the meeting: "We are heading for a fucking car crash."*<sup>76</sup>

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<sup>75</sup> Home Office website, 13.7.10: <http://www.homeoffice.gov.uk/media-centre/press-releases/counter-powers>

<sup>76</sup> *The Observer*, 31.11.10: <http://www.guardian.co.uk/commentisfree/2010/oct/31/andrew-rawnsley-coalition-terrorism-laws>

According to Rawnsley, heavy pressure to keep control orders has come from Jonathan Evans, the head of MI5: he reportedly took the unusual step of writing directly to the Prime Minister to warn that public safety cannot be guaranteed without their continued use. By contrast, Lord Macdonald informed Theresa May that he would condemn a decision to retain control orders in any form. This led the Home Secretary to publically rebuke him on 31 October. On the same day, in a clear illustration of the lack of cohesion within the coalition, Chris Huhne, the Secretary of State for Energy, told the BBC:

*We voted against control orders repeatedly, and I think that all of us in government frankly want to preserve the rule of law... I want to see people who are suspected of terrorism brought to justice properly, through the courts, in the same way we have traditionally done in this country for any other offence.*<sup>77</sup>

The review of terrorism powers is being conducted by the Office for Security and Counter-Terrorism, a unit based in the Home Office and staffed by active and former members of UK security services. Its preliminary findings were reported to recommend the continuation of the control order regime, but in early January 2011, before the outcome of the review had been made public, Nick Clegg announced pre-emptively that: "Control orders cannot continue in their current form. They must be replaced."<sup>78</sup> Similarly, David Cameron said:

*The control order system is imperfect. Everybody knows that. There have been people who've absconded from control orders. It hasn't been a success. We need a proper replacement and I'm confident we'll agree one.*<sup>79</sup>

The Lib Dems have long pledged to abolish control orders but this is by no means a straightforward victory for opponents of the scheme. Clegg announced that terrorism suspects will no longer be placed under "virtual house arrest" but acknowledged the need for an alternative system to monitor and when necessary restrict the movements and behaviour of these individuals.

*One thing I can predict safely is that, for people who think control orders as they are, are perfect, they will be disappointed. For people who think they should be scrapped altogether, they will be disappointed as well. It's clear that there are some very hard measures in the existing control orders. I am going to change it. What I am not prepared now to say is what aspect of the regime is going to change.*<sup>80</sup>

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<sup>77</sup> The Telegraph, 1.11.10: <http://www.telegraph.co.uk/news/uknews/law-and-order/8100429/Coalition-heading-for-car-crash-over-control-orders.html>

<sup>78</sup> Cabinet Office website, 7.1.11: <http://www.dpm.cabinetoffice.gov.uk/news/civil-liberties-speech>

<sup>79</sup> BBC website, 5.1.11: <http://www.bbc.co.uk/news/uk-politics-12120911>

<sup>80</sup> The Telegraph, 7.1.11: <http://www.telegraph.co.uk/news/newstoppers/politics/nick-clegg/8245726/Nick-Clegg-control-orders-will-be-reformed-but-not-scrapped.html>

Details of what will replace control orders are expected to be announced by February 2011. Theresa May is believed to favour a two-tier system under which the severity of restrictions imposed on an individual would be dependent on the security risk they are deemed to pose. Relocation orders which currently force recipients of control orders to leave the community in which they live will reportedly be scrapped but Clegg was evasive when questioned on the future use of curfews and it is likely that they will be retained in some form. Suspects will be granted greater freedom of movement and limited access to the internet and mobile phones but placed under increased surveillance. The BBC reports that a working title for the new system is "surveillance orders."<sup>81</sup>

Whatever delicate compromise the coalition eventually arrives at there is a distinct possibility that it will prove unsatisfactory to proponents and critics of control orders alike. Critics of control orders have expressed concern that the coalition might simply repackage elements of the scheme under a new name. Meanwhile the scheme's supporters are intrinsically critical of any weakening of the capacity of UK security agencies to monitor terrorism suspects. Labour has also wasted no time in accusing the coalition of putting its internal political stability ahead of national security.<sup>82</sup>

The situation is further complicated by the significant pressure exerted by civil servants and intelligence agencies. May has been roundly accused of being easily influenced by "Whitehall securicrats", a suggestion she felt the need to refute in a BBC interview: "I can assure you I am not being overwhelmed by anybody or anything."<sup>83</sup> Such is their influence however, that Henry Porter suggests that:

*...the more one hears about the row behind the scenes the more one suspects that the fault line exists not just between politicians of different stripe, but between the coalition and an impatient authoritarian rump of civil servants, police and the intelligence officers. An unelected establishment is fighting very hard to retain an arbitrary power that was granted by Labour with its customary lack of care for Britain's traditions of justice and rights.<sup>84</sup>*

What is clear is that the need for repeal of control orders is greater now than ever. During the last six months their use has been significantly undermined by two high profile legal defeats. In June, the Supreme Court ruled that a control order imposed on a 32 year-old Ethiopian man breached his Article 8 rights to private and family life. The order had stipulated that he move 150 miles away from his family to the Midlands so as to make it

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<sup>81</sup> BBC website, 11.1.11: <http://www.bbc.co.uk/news/uk-politics-12163629>

<sup>82</sup> BBC website, 6.1.11: <http://www.bbc.co.uk/news/uk-politics-12127325>

<sup>83</sup> The Guardian 31.10.10: <http://www.guardian.co.uk/law/2010/oct/31/theresa-may-lord-macdonald-control-orders>

<sup>84</sup> The Guardian 7.11.10: <http://www.guardian.co.uk/commentisfree/2010/nov/07/freedom-bill-repressive-control-orders>



harder for him to see his "extremist associates."<sup>85</sup> And in July, the government lost its appeal against the quashing of two control orders. The Labour government, in an attempt to avoid liability, had responded to the House of Lords' June 2009 ruling that the system breached Article 6 rights to a fair trial by revoking the control orders of two men. The court of appeal upheld the high court's decision that the orders must instead be quashed so as to allow them to claim compensation.<sup>86</sup>

On 20 January 2011, Home Office minister Damian Green announced that the government would not seek to renew the 28 day limit on pre-charge detention for terrorism suspects when it lapses on 25 January. The maximum period that individuals can be held without charge will revert to 14 days - still the longest anywhere in the western world - except on predefined occasions:

*We are clear that 14 days should be the norm and that the law should reflect this. However, we will place draft, emergency legislation in the House library to extend the maximum period to 28 days to prepare for the very exceptional circumstances when a longer period may be required.*<sup>87</sup>

Other areas of the government's counter-terrorism review have raised concern. In its 137 page response to the review, titled *From 'War' to Law*, Liberty warned that government plans to proscribe non-violent organisations that promote hatred would be a "step too far":

*The current power to ban organisations is already far too wide, compounded by the inclusion of 'glorification' as a ground for proscription. Any extension to 'hatred' would capture an innumerable number of organisations, including, potentially, political or religious bodies. It would be a grave step indeed to ban an organisation on the basis that its message was offensive rather than violent.*

The potential extension of "the use of deportations with assurances" is also extremely worrying. Under the principle of non-refoulement, the UK is prohibited from deporting anyone to a country in which they would likely face torture and other cruel, inhuman or degrading treatment. The thoroughly discredited system of "assurances" bypasses this obligation by using an unenforceable "memorandum of understanding" with the country to which the individual is to be returned affirming that their human rights will not be violated. A 2008 Human Rights Watch report criticised the UK for contributing to the "erosion of the global ban on torture" by seeking "assurances over the years from a veritable A-list of abusive regimes:

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<sup>85</sup> Institute of Race Relations website, 24.6.10: <http://www.irr.org.uk/2010/june/ha000044.html>

<sup>86</sup> BBC website, 28.7.10: <http://www.bbc.co.uk/news/uk-10788933>

<sup>87</sup> Home Office website, 20.1.11: <http://www.homeoffice.gov.uk/media-centre/news/pre-charge-detention>

Algeria, Egypt, Jordan, Libya, and Russia, to name a few.”<sup>88</sup> More recently, in June 2010, Amnesty UK condemned the UK’s deal with Libya insisting that: “Libya’s international partners cannot ignore Libya’s dire human rights record at the expense of their national interests.”<sup>89</sup> Amnesty International has called on the UK to scrap the system entirely.<sup>90</sup>

In another disturbing development, it emerged in June that members of Islamist groups jailed for terrorism offences are having unprecedentedly severe parole conditions imposed upon their release. Harry Fletcher, assistant general secretary of Napo, the union for probation staff, told the Guardian:

*The conditions amount to control orders by the back door and are applied regardless of the seriousness of the original offence and any genuine attempt at rehabilitation or reform...The individual offenders are being set up to fail in order to maximise the chance of recall.*<sup>91</sup>

## Part IV: Conclusion

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The government might claim to have acted on its coalition agreement commitments, but in many cases this has merely taken the form of establishing - or announcing its intention to establish - a consultation or a commission of enquiry. It is no doubt prudent not to rush into legislation, but the two parties were in agreement before the general election on the need for definitive change on a number of key civil liberties issues and six months later it is disappointing that only the futures of identity cards and ContactPoint have been resolved. In many cases the imposition of lax timescales has meant slow progress. And on intrinsically divisive topics such as the future of the Human Rights Act and counter-terrorism legislation, commissions have clearly been used as a stalling tactic to avoid creating friction within the coalition and to provide time during which common ground can be found. These difficult decisions cannot be delayed indefinitely and it remains unclear which party will hold sway. The contents of the much anticipated Freedom Bill will go a long way towards revealing the extent of the coalition’s commitment to civil liberties.

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<sup>88</sup> Human Rights Watch World Report 2008:

[http://www.hrw.org/legacy/wr2k8/diplomatic/index.htm#\\_Toc186336499](http://www.hrw.org/legacy/wr2k8/diplomatic/index.htm#_Toc186336499)

<sup>89</sup> Amnesty UK website, 23.6.10: [http://www.amnesty.org.uk/news\\_details.asp?NewsID=18840](http://www.amnesty.org.uk/news_details.asp?NewsID=18840)

<sup>90</sup> Amnesty International website, 14.4.08:

<http://www.amnesty.org/en/library/asset/EUR45/004/2008/en/00b907a8-07d4-11dd-badf-1352a91852c5/eur450042008eng.html>

<sup>91</sup> The Guardian, 27.6.10: <http://www.guardian.co.uk/society/2010/jun/27/civil-liberties-parole-curbs-islamists>