

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Human Rights Legislation Audit

2008

Counter-Terrorism Act 2008

The Act contains:

- provisions allowing post-charge questioning in terrorism cases;
- the extension of DNA removal to those on control orders (that the Government needed to make provision for this highlights how illogical the control order regime is. The police have – for some time - been able to take DNA from anyone that is arrested yet as those on control orders may have never been arrested, there was no mechanism for DNA sampling and retention);
- notification requirements and travel restrictions for convicted terrorists;
- provisions which aggravate offences with a terrorist connection;
- an offence of passing on information about members of the armed forces/police (this offence is extremely broad and includes asking for information which might be useful for the purposes of terrorism.
- new powers to remove documents for inspection.

The Bill also puts the secret service DNA database on a statutory footing and allows the cross-referencing of this database with the national police database.

The Government was forced to drop plans to extend pre-charge detention to 42 days and to allow for secret inquests “in the interests of national security”.

Criminal Justice and Immigration Act 2008

This Act runs to over 200 sections and covers a range of issues including: the creation of the latest preventative order, breach -of which is a criminal offence (The Violent Offender Order); a new “Special Immigration Status”, enabling restrictions to be placed on those believed to have been involved in terrorism and other serious crimes; restriction of the Court of Appeal’s power to quash criminal convictions resulting from grave breaches of due process; restrictions on the amount of compensation that can be claimed by victims of miscarriages of justice; a range of new offences including one of possession of extreme pornography; a new offence of incitement to homophobic hatred; and a “Megan’s law” type provision placing obligations on authorities to inform people of the presence of persons with sex offence convictions in the locality..

2007

Corporate Manslaughter and Corporate Homicide Act 2007

Received Royal Assent 26 July 2007

The Corporate Manslaughter and Corporate Homicide Act 2007 introduces a new statutory offence of corporate manslaughter. This offence is committed, in brief, where a corporate body causes a person's death by virtue of a gross breach of a "duty of care" owed to that person. We welcome the creation of this offence, which will fill a gap in the criminal law, deter corporate gross negligence which could kill, and provide a means for families of those killed through corporate gross negligence to obtain justice.

In principle, Crown immunity does not apply in respect of the offence, but the Government and its agencies are shielded from prosecution by a series of exemptions. The exemptions are neither necessary nor desirable. They offend against the rule of law and against the principle that everyone should be equally entitled to the law's protection.

The exemptions include:

- A broad exemption where a body is discharging an "exclusively public function".
- Exemptions in respect of military, policing and law enforcement activities.
- Exemptions in respect of the emergency services, child protection activities and probation activities.

The offence would, however, apply to people who are killed by corporate gross negligence while in custody. The provisions extending the offence to deaths in custody are, however, unlikely to be brought into force for some time, and so custodial deaths will remain beyond the reach of the Act.

Serious Crime Act 2007

Received Royal Assent 30 October 2007

Part 1 of the Serious Crime Act 2007 (not yet in force) introduced the Serious Crime Prevention Order (or 'Gangster ASBO'), a new civil order which is a kind of hybrid of ASBOs and control orders. Like its predecessors the SCPO will function to bypass the criminal justice system.

- SCPOs can impose severe restrictions on individual rights and freedoms, including restrictions on who a person can communicate with and where a person can live, work or travel.
- SCPOs enable criminal sanctions to follow from an act which is not in itself a crime.
- SCPOs may be imposed for up to five years and breaching the conditions can result in up to five years' imprisonment.

New information sharing powers are also introduced in s.73 and Schedule 7 (not yet in force) which allow "data matching" (computerised fishing expeditions through huge amounts of electronic information) for fraud detection purposes. The Audit Commission will be able to compel the

provision of detailed financial or other information for data matching purposes without any evidence of criminality.

UK Borders Act 2007

Received Royal Assent 30 October 2007

Under s.32 UK Borders Act 2007 (not yet in force), foreign nationals who have been imprisoned for more than one year or imprisoned for specific offences would face automatic deportation. Although the Act specifies that such deportation will not take place where it would breach a person's ECHR rights or the UK's obligations under the Refugee Convention, these provisions are nevertheless likely to unfairly sweep up non-violent offenders. It also marks an unwelcome departure from the traditional approach in both criminal and immigration matters of judging each case on its particular merits.

Sections 5-15 allow for the Secretary of State to require all non-EEA nationals to register data. They will be required to possess a 'Biometric Identification Document'. Powers to take, retain and share data go way beyond those contained on the National Identity Register set up by the ID Card Act 2006. These provisions will effectively impose internal immigration controls which could lead to ethnic minorities being unfairly targeted.

In addition, the Act provides increased detention, search, entry and seizure powers for immigration officers, part of the Government's general movement toward extending police powers to non-police agencies. The new powers may also prove socially and racially divisive.

Under s.16 extra conditions can be imposed on those given limited leave to remain. Restrictive residential requirements could raise Article 8 and Article 11 issues under the Human Rights Act 1998.

2006

Identity Cards Act 2006

(Royal Assent 30 March 2006)

Enabling legislation to require the registration of everyone in the UK for more than 3 months (although deals were struck over the course of the passage of the Bill so that registration is not compulsory these are of little consequence as by January 2010 anyone applying for a passport will be required to register).

The National Identity Register (NIR) is at the heart of the Act and it is the NIR rather than the ID card itself that will have the most profound impact on privacy. The ID cards themselves are more a by-product of registration

- Sections 1 – 5 create the framework for registration. The two specific purposes of the NIR are to create a means for people to establish their identity and to allow a means for that identity to be checked when necessary 'in the public interest'. The definition of what constitutes the

public interest is very broad (national security; prevention or detection of crime; immigration; employment prohibition and provision of public services)

- Section 1 also contains a list of 'registrable facts' which is the information that will initially be held on the register. Contains information such as: name, current and previous addresses, date of birth, identifying information (such as photograph, signature, fingerprints or other biometric information), current and previous residential status and 'numbers allocated for identification purposes'. While the scope of information has been initially limited it is likely to expand. Indeed it could be argued that it must expand if the scheme is going to achieve the aims the Government has promised.
- The Act creates a wide ranging regime allowing access to the register without consent to named public bodies and agencies. Information can be passed to anyone for the purposes of crime detection and prevention. It also allows information to be provided to private sector bodies with a person's consent in order to assist with verification. Bodies with access to the register include: the Security Services, GCHQ, various policing bodies, the Commissioners of Customs and Excise.
- The Act allows for an 'audit trail' to be part of the information contained on each individual on the NIR. Paragraph 9 f Schedule 1 allows for a record to be made of every occasion where information in the register is provided to anyone, details of the person to whom the information has been given and 'other particulars' relating to each occasion this is done. This will create an imprint of our existence going way beyond that currently created

Some general concerns:

- No other common law country has an ID card scheme. Civil law countries tend to have far stronger codified privacy laws
- Not all compulsory identification schemes are the same. The scope of information sharing allowed under the Act goes far beyond those in other countries
- If greater information were to be held on the NIR it would have the potential to allow some degree of profiling
- The Act is riddled with reserved powers allowing the Secretary of State to extend the scope of the scheme by Parliamentary order. This means that: the information contained on the NIR and persons allowed access to it can increase dramatically over time.

Terrorism Act 2006

Received Royal Assent 30 March 2006

The Act creates a number of new criminal offences relating to terrorism. The most controversial are as follows:

- The new offence of "encouragement of terrorism" (commonly referred to as "glorification of terrorism") which criminalises statements that

people might understand as encouragement to commit terrorist offences. The person making the statement does not need to intend to encourage people to commit acts of terrorism and no act of terrorism actually needs to be committed. Because of the breadth of the offence and of the definition of “terrorism” this could criminalise people who speak out against repressive regimes in Zimbabwe or North Korea. We also fear that the risk of prosecution will make people afraid publicly to express their opinions on matters like the UK’s foreign policy.

- The Act extended the grounds for proscription under the Terrorism Act 2000 making it possible to criminalise membership or support of non-violent organisations that ‘glorify’ terrorism. This amounts to state censorship of political views which could be very counter-productive, creating martyrs and driving debate underground.
- The Government planned to allow three months’ detention of terror-suspects without charge. Liberty feared that the 90 day detention would have had a severe impact on community relations because minorities would be targeted for what is the equivalent of a six month custodial sentence – more than twenty times the pre charge detention time limit for murder. The Government were defeated in the House of Commons on 9 November 2005 which decreased the maximum time for pre-charge detention to 28 days. This still doubled the previous maximum of 14 days and Liberty maintains that no extension of pre-charge detention can be justified without considering alternative measures.

Immigration, Asylum and Nationality Act 2006

Received Royal Assent 30 March 2006

The Act contains a number of provisions designed to tackle terrorism. This continues the trend of treating counter-terrorism as a matter of immigration and asylum control, which has fed into community unrest, racial tension and marginalisation. The powers include:

- Sweeping powers for the Home Secretary to remove British citizenship from dual nationals where he thinks this would be “conducive to the public good”. This broad discretionary power is inappropriate in the context of something as serious as removing a person’s citizenship. It is also unnecessary because substantial powers to remove a person’s citizenship already exist. The proposal flies in the face of the Government’s rhetoric about the importance of “Britishness” and the introduction of citizenship ceremonies and oaths of allegiance.
- The requirement to refuse asylum to anyone who has carried out, or encouraged others to carry out, “acts of committing, preparing or instigating terrorism” anywhere in the world and even if their actions do not constitute a criminal offence. Given the breadth of the definition of terrorism, this could include people who face a real risk of persecution at home because they have supported political organisations, like the ANC, which have opposed repressive regimes. This provision could also put the UK in breach of the 1951 Refugee Convention.

Racial and Religious Hatred Act 2006

Received Royal Assent 16 February 2006

Section 2 of the Act amends the Public Order Act 1986 to create offences involving stirring up hatred against persons on religious grounds. The Government originally proposed to extend the existing racial hatred offences to include acts “likely to stir up racial or religious hatred”. The House of Commons defeated the Government by voting for amendments restricting the offences to intentional acts and including a clause protecting freedom of expression.

- The Act is a great improvement on the bill proposed by the Government. Criminalising even the most unpalatable, illiberal and offensive speech should be approached with grave caution in a democracy. Free speech is far more precious than protection from being offended.
- Liberty accepts that free speech should not be completely unlimited. The offences relating to inciting *racial* hatred already limited free speech. However, races are recognised by visual (and immutable) characteristics, whereas religions are identified by a body of ideas and practices. The line between hatred for a system of ideas and its proponents is fine and subjective. This makes the broad criminalisation of “religious hate speech” far more dangerous to freedom of conscience and expression.

2005

Prevention of Terrorism Act 2005

Received Royal Assent 11 March 2005

The Act introduced control orders as an alternative to detention without trial under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA). Control orders can place restrictions on liberty, including curfews, tagging, and house arrest. The restrictions contained in control orders can last indefinitely, as there is no requirement for them to be part of a criminal process leading to a trial.

- Control orders, like detention without trial, deny people the right to a fair trial and the presumption of innocence.
- They can be used as punishment in themselves without trial (breaching Article 7 of the ECHR).
- The decision as to whether to make a control order is based on secret intelligence so the subject cannot test the case against him in any meaningful way.

Serious Organised Crime and Police Act 2005

Received Royal Assent 7 April 2005

Section 110 of the Act, which came into force on 1 January 2006, made all offences arrestable. Previously, a police officer had to determine whether he suspected a person of committing a non-arrestable, arrestable or serious arrestable offence. The powers available flowed from that determination. Now a police officer may arrest someone he has reasonable grounds for suspecting of committing any offence if he reasonably believes arrest is necessary.

The Government's rationale for the change was that police officers found the powers and procedures for arrest 'bewildering' and found it hard to decide whether they could arrest in a particular case.

- Liberty considered the proposed solution disproportionate to the problem identified, which indicated a need for greater clarity and better police training, not a 'lowest common denominator' approach to arrest powers.

Section 128 (in force 1 July 2005) created a new offence of trespassing on a designated site. The Secretary of State may designate a site by order if it is (a) Crown land, (b) belongs to the Monarch or Heir to the Throne or (c) if the Secretary of State believes it appropriate for designation in the interests of national security.

- The third ground allows the Government free rein to effectively criminalise trespass as there is no attempt to define what constitutes "national security" and no threshold for the Secretary of State to satisfy.
- The Act allows designation without requiring any justification of why the Secretary of State believed it was appropriate. With no need for justification these powers can be used on a purely subjective belief. The creation of this offence is part of a trend towards marginalisation and criminalisation of legitimate protest.

Section 132 (in force 1 August 2005) criminalised unauthorised demonstrations within an area up to a kilometre from Parliament Square (the precise area is designated by statutory instrument). The only defence is that the person believed that authorisation had been given. If a demonstration is authorised it can be made subject to extremely wide restrictions. There can be limitations on place, time, duration, size and noise.

- This allows any demonstration to effectively be neutered. The clause was introduced in an attempt to stop the protest of Brian Haw, who has held a four-year anti-war vigil in Parliament Square. The High Court has ruled, however, that since his protest began before the Act became law he did not need to seek authorisation and therefore his protest may continue. All other demonstrations are caught by the Act.

The Act created new offences of 'interference with contractual relationships so as to harm animal research organisation' (section 145) and 'intimidation of persons connected with an animal research organisation' (section 146)(both in force 1 July 2005). They criminalise 'relevant acts' that are intended to stop

someone fulfilling a contractual relationship or which would otherwise interfere with a relationship with an animal research organisation. A relevant act is 'an act amounting to a criminal offence', or a 'tortious act causing B to suffer loss or harm of any description'.

- It is relatively easy to commit a tort unknowingly. For example, trespass is a tort and can be committed without the tortfeasor knowing they are on private land.
- The criminalisation of peaceful economic protest is inappropriate and disproportionate.

2004

Asylum and Immigration (Treatment of Claimants etc) Act 2004

Received Royal Assent 22 July 2004

The Act creates a new offence at section 2 (in force from 22 September 2004) to deal with those arriving in the UK without a valid immigration document and who cannot show that they have a reasonable excuse.

- Article 31 of the Convention Relating to the Status of Refugees (the 'Refugee Convention') states that refugees should not be prosecuted on account of their illegal entry. Liberty reiterated the concerns of the JCHR that the provision is not compatible with the United Kingdom's obligations under Article 31 of the Refugee Convention.

The Act introduced a number of small but significant amendments to the asylum support system at a very late stage in the life of the Bill, after the Committee Stage in the House of Lords). All of them have adverse consequences for asylum seekers.

Section 9 (in force 1 December 2004) inserts a fifth category of individual who is ineligible for asylum support or community care provision as a result of Schedule 3 to the 2002 Act. These are failed asylum seekers with minor dependents whom the Home Secretary has "*certified*" as having failed without reasonable excuse to take reasonable steps to leave the UK voluntarily. There is a right to appeal to an Asylum Support Adjudicator. A local authority will retain the power to take any minor dependents into care.

- Liberty is concerned that forcing parents to choose between keeping children with them on the streets or asking a local authority to provide the children with accommodation on their own is likely to give rise to a huge number of cases where Article 8 of the European Convention on Human Rights is breached.
- Where a destitute failed asylum seeker chooses to keep his or her children with him, it is likely to be only hours or days before the condition of the family approaches the level of inhuman and degrading

treatment necessary to prove a breach of Article 3 of the European Convention on Human Rights.

[Above commentary on section 9 overturned by decision in Limbuela]

Section 10 (in force from 1 December 2004) amends section 4 of the 1999 Act - which is used to provide “hard cases” support – to enable the Home Secretary to make entitlement to such support conditional on the performance of community activities/work.

Section 12 (not in force yet) abolishes the backdating of income support, housing benefit and council tax benefit for those who are granted refugee status. This is contrary to the Refugee Convention which recognises a person as a refugee from the point of claim, not from the point of acceptance by the State as a refugee.

Section 13 (not in force yet) replaces the backdating of benefits with a means tested “integration loan” for newly recognized refugees.

Section 26 (in force 4 April 2005) of the Act provides for the unification of the immigration and asylum appeals system into a single tier of appeal with limited onward review or appeal, on a point of law only.

Domestic Violence, Crime and Victims Act 2004

Received Royal Assent 15 November 2004

Section 5 creates an offence of causing or allowing the death of a vulnerable adult. So broadly drafted that if two people were caring for a vulnerable person and evidence can't establish which caused the death, both could be convicted.

Section 6 applies when the defendant has been charged with both murder/manslaughter and the section 5 omission offence (both sections in force 21 March 2005). Under subsection 6(2) if a defendant remains silent as to the section 5 offence, the jury is allowed to “*draw such inferences in determining whether he is guilty of murder or manslaughter...*” In this way, a defendant's failure to answer questions in relation to a section 5 offence can be used as evidence against him in order to establish a case to answer on the murder/ manslaughter charge.

- Weak cases on the murder/manslaughter charge, which do not otherwise amount to a case to answer, would be left to a jury.
- Likely to prejudice defendant's right to a fair trial under art. 6 of the ECHR.
- Defendant is entitled to remain silent and to require the prosecution to prove his guilt beyond reasonable doubt.
- An inference of guilt from silence can only be proper and fair where a case has been made out in the first place.

- Someone who is innocent of any offence, but who is afraid of giving evidence on their own behalf, can be convicted of murder or manslaughter.

Under subsection 6(4), the question of whether or not there is a case to answer on the charge of murder or manslaughter will be postponed until all the evidence has been heard. This means that when operating in conjunction with subsection 6(2), an adverse inference can be drawn from the defendant's failure to give evidence in trial proceedings.

- Likely to prejudice defendant's right to a fair trial under art. 6 of the ECHR.
- The defendant is damned if he gives evidence and damned if he does not.
- Giving evidence is likely to provide the prosecution with enough evidence to show that there is a case to answer.
- Not giving evidence means that on a submission of no case to answer, the defendant will find that the case against him includes the additional component of an adverse inference.

Children Act 2004

Received Royal Assent 15 November 2004

Part 2 of the Act allows for the creation of databases holding information on all children and young people, accessible to a wide range of public bodies. There is wide scope to leave the detail of the provisions to secondary legislation. Section 12 (in force 1 January 2006) relates to information sharing, types of information that will be stored and categories of persons/bodies that will be required to disclose it. Information to be stored includes at section 12(4)(g) any information '*as to the existence of any cause for concern*'; at 12(4)(h) '*information of such other description... as the Secretary of State may by regulations specify*'. Section 12(7)(f) gives the government powers to require the disclosure of information by '*a person or body of such other description as the Secretary of State may by regulations specify*.'

- Parliamentary scrutiny is effectively ousted by the provisions of section 12 by allowing primary legislation to be used as a tool for the passing of regulations.
- It is likely to be presumptuous for the Secretary of State to make a declaration under section 19(1)(a) of the Human Rights Act 1998 that the provisions are compatible with Convention Rights because, by leaving the detail to secondary regulations, it is not yet apparent the extent to which the rights will be engaged.
- Article 8 rights to privacy are likely to be engaged.

Section 12(11) overrides the common law duty of confidentiality.

- The doctrine of confidence exists not to prevent appropriate passing on of information but to allow a relationship of trust between professional and client.
- Overriding such a duty risks undermining this relationship and may prevent children seeking help in the first place.

Regulations introduced in 2007 and "contactpoint" the re-named database due to go live in Jan 2009. Regulations allow access for local authorities and 'national partners' (a number of children's charities including: KIDS, Barnado's, NCH). Local authorities can grant access to persons specified in Schedule 3 of the Regs – including: social service providers; health care employees; members/employees of a police authority; chief police officers; YOT members; probation board officers, prison and secure training centre governors etc. Information to be included in the database includes: name, address, gender, DOB, name and contact details of educational institution attended; contact details of anyone providing primary medical services as well as details of medical services provided

Liberty's concerns relate principally to the child protection risks created by the database. The centralisation of information on every child will make it harder to spot the wood from the trees and make it more likely that children who are truly at risk will not get the help that is needed. The database will also be a

honeypot of information for those seeking to do harm to children. This is especially concerning given the large numbers that will have access.

Civil Contingencies Act 2004

Received Royal Assent 18 November 2004

Part 2, section 19 (in force 10 December 2004) defines an emergency as an event or situation which threatens serious damage to human welfare or to the environment in the United Kingdom or in a Part or region; or war, or terrorism, which threatens serious damage to the security of the United Kingdom.

- The event or situation itself need not be of any seriousness.
- A relatively innocuous event may be considered to have implications of damage sufficient to trigger the emergency powers.
- The powers will almost certainly result in infringements on freedoms that could not be justified if there were not an emergency.
- The trigger for using the powers should be set at a higher level.

At 19(2) the events which threaten human welfare include (f) disruption of a system of communication, and (g) disruption of facilities for transport.

- This makes the definition of 'emergency' too broad, as it includes a wide range of events that pose no risk to public safety, e.g. a computer virus or a postal strike under (f) or a fuel strike or poor weather condition under (g).
- If a serious disruption to a communication system or transport facilities *did* threaten human welfare (e.g. a computer virus that attacked the air traffic control network under (f) or an ambulance workers strike under (g), this would fall within an event threatening loss of human life (section 19(2)(a) or human injury (section 19(2)(b) or disruption of services relating to health (section 19(2)(h)).

Under section 22(3)(i) (in force 10 December 2004) emergency regulations may create an offence of failing to comply with a provision of the regulations; failing to comply with a direction or order given or made under the regulations; or obstructing a person in the performance of a function under or by virtue of the regulations.

- Emergency regulations may be made very quickly and people may be unaware of the content of regulations.
- A person can be convicted of a criminal offence even if they did not know that they were acting in breach of regulations, or had a lawful excuse for doing so.

Under section 22(3)(j) emergency regulations may disapply or modify an enactment or a provision made under or by virtue of an enactment. There is an exception to this at section 23(5) (in force 10 December 2004) so that emergency regulations may not amend 'this Part of this Act or the Human Rights Act 1998'.

- Liberty is pleased that the Human Rights Act 1998 has been given protection from the provisions of 22(3)(j).

Under section 22(3)(b) and (c) emergency regulations may provide for the confiscation and destruction of property with or without compensation. This is the only reference to compensation in the Act.

- Inadequate provision for compensation to be awarded through the Act.

2003

Sexual Offences Act 2003

Received Royal Assent 20 November 2003 (in force 1 May 2004)

Sections 5 to 8 provide for sexual offences against children under the age of 13. A child under the age of 13 is deemed incapable of giving legal consent to any form of sexual activity. Anyone who commits any of these sexual acts with a child under 13 is therefore guilty of the relevant offence.

- This criminalises behaviour where there has been consent *in fact* by an under-13 year old i.e. if children are playing 'Doctors and Nurses'; or where a 14 year old boy and his 13 year old girlfriend wish to engage in sexual behaviour to which both consent.

There is a "young man's defence" to the offences provided for at sections 9 to 12, if he reasonably believed the alleged victim was 16 or over.

- No recognition of the concept of actual consent, which if anything is all the more pressing in the 13-16 age group.
- Criminalises the widely occurring and harmless sexual activity among members of this age group.

Familial sex offences – includes a very broad range of relatives.

Anti-Social Behaviour Act 2003

Received Royal Assent 20 November 2003

Part 4, Section 30 (in force 20 January 2004) contains new police powers to disperse groups of 2 or more and return young people under 16 who are unsupervised in public places after 9pm to their homes.

- The existing legislation already grants the police the capacity to satisfactorily deal with criminal behaviour. For example, individuals could be arrested under s4 or s5 of the Public Order Act 1986 (threatening behaviour) or for breach of the peace.
- The protections in 30(5) are not necessarily sufficient to ensure that an individual's rights under Article 11 of the Human Rights Act 1998 (freedom of assembly) would be preserved.

Part 7, Section 57 (in force 20 January 2004) amends the definition of public assembly in section 16 of the Public Order Act 1986 from "20 or more persons" to "2 or more persons" so that the powers in that Act for a senior police officer to impose conditions on public assemblies apply to groups of two or more people.

- Any situation where the police are able to self authorise restrictions on the right to protest should be treated with great caution.
- These powers give rise to criminal sanction for behaviour that would not in itself be unlawful other than the imposition of conditions.
- The government, with no given justification, has decided that two people can constitute an assembly.

Part 7, section 60 (in force 27 February 2004) inserts a new section 62A into the Criminal Justice and Public Order Act 1994 so as to create a new power for a senior police officer to direct a person to leave land and remove any vehicle or other property with him on that land. This section also inserts a new section 62B into the 1994 Act. Its effect is that a person commits an offence if he fails to comply with a direction given under section 62A.

- The unnecessary extension of the criminal law is directed at travellers for acts which would normally be civil torts for trespass and nuisance.

Part 9, Section 85 (all sections now in force – appointment dates from 20 January 2004 to 1 October 2004) amends section 1 of the Crime and Disorder Act 1998 ("the 1998 Act"). Section 1 of the 1998 Act (as amended by the Police Reform Act 2002) permits the police, the British Transport police, local authorities and registered social landlords to apply for anti-social behaviour orders (ASBOs).

- ASBOs can be issued on a civil burden of proof, but incur a criminal penalty if breached.
- Unacceptable blurring of the criminal and civil law.
- Already sufficient laws and police powers in place to deal with so-called "low-level" crime.

Extradition Act 2003

Received Royal Assent 20 November 2003 (In force 1 January 2004)

The Extradition Bill introduces a two-tier system of extradition depending on the identity of the requesting state. Category 1 territories are EU and Schengen states; Category 2 territories are all other countries with which the UK has extradition arrangements. In relation to Category 1 territories, the Bill is intended to implement the EU Council Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States ('EAW'). The EAW is based upon the presumption that EU countries all have

fair and equal systems of justice which should remove the need for any other country to scrutinise the fairness of extradition to such a country.

- This presumption is seriously open to question.
- The EAW proposals increase the risk of injustice in such cases by removing the power of the High Court and Secretary of State to scrutinise the merits in an individual case.
- There is no guarantee that other countries will not be added to Category 1 so that extradition without close scrutiny would be possible to countries with under-developed legal systems.
- The European Convention on Extradition has been signed by countries with appalling human rights records whose judiciaries in many cases are neither independent nor impartial.

The EAW has removed the bar on dual criminality, whereby a person could not be extradited if the extradition offence was not an offence in the UK. Under the EAW, a person can now be extradited if, despite the fact that the extradition offence is not an offence in the UK, it is an offence and carries a prison term of three years in the issuing Member State.

The UK Act goes further in allowing a person to be extradited for an offence which carries a prison term of 12 months. This provides a significantly lower level of protection than the three-year threshold required by the EAW.

- Liberty has concerns over the operation of an extradition process that allows persons to be extradited from the UK for offences that are not criminal in the UK
- The potential for extradition for trivial offences is greatly increased as any extradition offence carrying a term of imprisonment greater than 12 months can result in removal

Criminal Justice Act 2003

Received Royal Assent 20 November 2003

Enormous piece of criminal justice reform (339 sections and 38 schedules).

Part 1 reformed PACE powers

Part 3 created conditional cautions

Part 7 provides for trials on indictment to be heard without a jury. Under section 43 (not yet in force), the prosecution can make an application for certain fraud cases to be conducted without a jury. Under section 44 (not yet in force), the prosecution can make an application for the trial to be conducted without a jury where there is a danger of jury tampering.

- This creates a two-tier justice system. Fact finding by a jury is the best way to dispose of a case. It allows justice to be delivered openly and fairly.

Part 10 (sections 75 to 92, 94 and 95 in force 4 April 2005, section 93 in force 29 January 2004, section 96 in force 18 April 2005, section 97 in force 7 March 2005) reforms the law relating to double jeopardy, by permitting retrials in respect of a number of very serious offences, where new and compelling evidence has come to light.

Liberty was absolutely opposed to the abolition of the bar on double jeopardy

- Abolishing the bar on double jeopardy will make every acquittal for a serious offence conditional.
- It is difficult to see how a well-known defendant would be able to receive a fair trial.

Part 11 (relevant sections 98-110 and 112 in force 15 December 2004) deals with the admissibility of evidence of a person's bad character.

- Allowing for greater admissibility of previous convictions and acquittals - will result in serious injustice.
- Courts already had powers to admit *relevant* past misconduct. The new provisions will result in convictions not because the defendant has committed an offence but because he is the type of person who commits offences.

Liberty was particularly concerned about the impact of admissibility of previous convictions in the Magistrates court where the magistrate is the arbiter on law and fact (i.e. Mag will have to determine whether to take a previous conviction into account)

2002

Police Reform Act 2002

Received Royal Assent 24 July 2002

Part 4 (in force 2 December 2002) contains provisions which give police powers to civilians acting as community support officers, investigating officers, detention officers and escort officers. CSOs are accredited by chief constables but there is insufficient accountability. This is problematic because-

- Police powers carry significant responsibilities and require expert training, management and accountability.
- Such powers belong to a professional police force, and should not be available to those not subject to the same standards of training, selection, control and accountability.

(Part 2 set up IPCC - in force 1 April 2003)

Proceeds of Crime Act 2002

Received Royal Assent 24 July 2002

Part 5, Chapter 1 (in force 30 December 2002) provides for the civil recovery of the proceeds of 'unlawful conduct'.

- Wrong to give the state a power to opt for extensive confiscation of defendants assets in circumstances where it does not have sufficient evidence to prosecute them in the criminal courts.
- Assuming that there is sufficient evidence to prosecute them, it is wrong to allow the state to opt for an easier path of pursuing someone in the civil courts.
- Unacceptable blurring of civil and criminal law - the civil standard of proof on the balance of probabilities rather than the criminal standard of beyond reasonable doubt applies.

Nationality, Immigration and Asylum Act 2002

Received Royal Assent on 7 November 2002

Section 55 (in force 8 January 2003) deprives an asylum seeker who is over 18 and not accompanied by minor dependents from NASS support if he or she did not – in the view of the Secretary of State for the Home Department (SSHD) – claim asylum *as soon as reasonably practicable* after his or her arrival in the UK.

- Hundred and possibly thousands of asylum seekers were rendered destitute – breach of Article 3 of the ECHR.

In the case of *R (Limbuella) v SSHD*^[1] the Court of Appeal found that Mr Limbuella's human rights under article 3 of the ECHR had been breached. Pending the Home Secretary's appeal to the House of Lords, since June 2004, NASS has changed its procedures to give emergency support while a decision is being made and will not refuse support unless it is positively satisfied that the asylum seeker has an alternative form of support.

Section 62 (in force 10 February 2003) extends the power to detain at any stage of the process, not just prior to removal. Section 68 (in force 1 April 2003) repeals the provision for automatic bail hearings which was provided by Part III of the Immigration and Asylum Act 1999. As an asylum seeker can be detained without evidence of having committed a crime or that he will abscond, it is even more important that the decision to detain should be subject to judicial scrutiny.

- Likely to engage Article 5 of the ECHR

2001

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Anti-Terrorism Crime and Security Act 2001

Received Royal Assent 14 December 2001

Part 4 (in force 14 December 2001, largely repealed by Prevention of Terrorism Act 2005) required derogation from the right to liberty under Article 5 of the European Convention on Human Rights. No other EU country has derogated from its ECHR obligations. It allowed the Home Secretary to certify foreign nationals whom he reasonably suspects have been involved in or acts of international terrorism, are members of an international terrorist group, or who have links with an international terrorist group and detain them if they cannot be deported because of the UK's international obligations (that is it is likely they would face torture, death or inhuman or degrading treatment if deported).

Suspects were neither charged nor prosecuted. Once certified, those detained could then be held in high security conditions. These certifications were based on secret intelligence that neither the detainee, nor his lawyers will ever see. The Home Office has conceded that such intelligence may include that gained by the torture of detainees elsewhere in the world. Detainees could appeal against certification to the Special Immigration Appeals Commission (SIAC) which is presided over by a high court judge, sitting without jury.

- SIAC's jurisdiction is severely limited as it does not deal with matters of evidence or proof. SIAC's sole task is to affirm or reject the contention that there was historical "reasonable suspicion" against a detainee. According to normal principles of British criminal justice (built upon the presumption of innocence), "reasonable suspicion" is the basis for initial arrest for a short number of days up to the charging of a suspect. It is not a sound foundation for a potential lifetime of incarceration.

The lawfulness of the detention was the subject of the judgment handed down by the House of Lords in *A and others, X & Y v Secretary of State for the Home Office* on 16 December 2004. The House of Lords held that the detention is unlawful, quashed the derogation order and made a declaration of incompatibility with the ECHR. The detention provisions in the Act were repealed by the Prevention of Terrorism Act 2005.

Criminal Justice & Police Act 2001

Received Royal Assent 11 May 2001

Sections 1 to 11 of Chapter 1 (in force 12 August 2002) allow the police to issue penalty notices on the spot or at a police station for a range of disorder offences if the police have 'reason to believe' that a penalty offence has been committed. If the person pays the penalty, this will discharge any liability to be convicted of the offence to which the notice relates. The offender can refuse to pay the fine and be tried for the offence in Court.

- Blurs civil and criminal procedures.

- Dilutes the principles and protections of criminal law in particular the presumption of innocence and the burden of proof.
- Notices are issued on a lesser standard of proof than the criminal burden of proof.

Sections 48 and 49 of Chapter 3 (in force 1 August 2001) amend section 14 and 15 of the Crime and Disorder Act 1998. The local child curfew scheme was introduced by section 14 of the Crime and Disorder Act 1998. This allows a local authority to ban children under 10 from being in a particular public place during specified hours between 9pm and 6am, otherwise than under the control of a parent or responsible adult. Any child found in breach of a curfew may be returned home, or to a place of safety if there are serious concerns about the child's safety in the family home. The Criminal Justice & Police Act 2001 Act raises the age limit to 15 and allows the police as well as the local authority to initiate a child curfew scheme.

- Giving this power to the police as well as the local authority is a move away from the principle of the welfare of the child towards the criminal process.
- Unlikely to comply with Article 8, the right to respect for private and family life or Article 11, freedom of assembly and association.
- Too widely drawn to be proportionate or necessary in a democratic society.

Part 3 sections 78 to 83 (some sections in force from January and April 2003) provide that fingerprints and DNA samples taken from suspects during the course of an investigation can be retained. Section 82 (in force 11 May 2001) extends the previous legislation so that retention is permitted even in circumstances where the suspect is cleared, i.e. charges against the suspect are dropped or he/she is acquitted at trial.

- Serious implications for the individual's right to privacy.

Social Security Fraud Act 2001

Received Royal Assent 11 May 2001

Section 1 amends the Social Security Administration Act 1992 at 109B and inserts new sections at (2A), (2B) and (2C) (in force 30 April 2002). This gives people authorised by the Secretary of State under section 109A or by a local authority under section 110A the power to require private and public sector organisations to provide information relating to a particular individual. Such organisations include banks, credit agencies and utility companies. The authorised officer must have reasonable grounds for believing that the suspect has committed, is committing or intends to commit a benefit offence. The authorised officer can also get access to the private information of a member of the family of the suspect.

- The organisations from whom information can be required is too broad, is not proportionate and infringes an individual's right to privacy.
- To allow someone to be investigated on the basis that they are likely to commit an offence may infringe Article 14 (discrimination) on the basis that investigators will have no other criteria on which to assess the risk of someone committing an offence other than by reference to his/her membership of a particular class or group of people.
- The provision to allow an investigator access to the private information of a family member of a suspect without reasonable grounds to suspect that family member of a benefit offence is a serious infringement on that person's right to privacy and is not justified.

2000

Regulation of Investigatory Powers Act 2000

RIPA regulates invasive surveillance activities through a framework of warrants and authorisations. The method of authorisation differs according to the types of surveillance:

- Interception of communications (the most invasive) requires the issuing of an interception warrant authorised by the Secretary of State who must be satisfied of necessity on proportionality grounds
- Intrusive surveillance (such as the use of a surveillance device planted in property or a car). The list of those who can provide authorisation is limited to the Secretary of State and a small number of others
- Directed surveillance (such as bugging a public place) and covert human intelligence (such as informants and undercover officers) are authorised internally.
- Access to communications data (the record of any electronic communication such as email, text, or phone call) is also self-authorising. A senior figure within the body accessing the data will provide authorisation
- The bodies who can apply for the different types of order are set out in 'RIPA orders' made through secondary legislation.

While the Act is an improvement on previous law (taking a more rights-conscious approach to surveillance) it can be accused of paying lip-service to proportionality while offering little opportunity to test whether the principles of proportionality are being adhered to.

Interception

- Liberty opposes executive authorisation of interception warrants. This remains the key sticking point about accountability of RIPA authorisation. The European Court of Human Rights has, on several occasions stressed the importance of the authorisation being judicial.
- The Interception of Communications Commissioner provides post-warrant oversight by reviewing the applications and submitting an annual report to the PM which is laid before Parliament without a confidential annex. Liberty has long argued that proper accountability requires greater transparency through the publication of more detailed annual reports.
- Liberty also advocates for the removal of the absolute bar on the admissibility of intercept as evidence. There are no fundamental civil liberty or human rights objections to the use of this material, properly authorised by judicial warrant, in criminal proceedings. Rules of criminal evidence will apply to ensure that evidence is not admitted in such a way as to unfairly prejudice the case. More recently, many of the exceptional counter-terrorism measures sought by the Government have been justified (or sought to be justified) on the grounds that obtaining sufficient admissible evidence to prosecute in terrorism cases is proving difficult. The Chilcot Privy Council Review on the Use of Intercept as Evidence (presented in Feb 2008) concluded that intercept could be used as evidence if appropriate safeguards are devised. The Government welcomed the review but is still dragging its feet on implementation.
- Liberty also has concerns about the lack of remedy for those who complain for a breach of Article 8. The Act provides for an Investigatory Powers Tribunal to rule on written complaints over all aspects of surveillance regulated by RIPA (other than where the activity is regulated by the Security Services). However the Tribunal cannot investigate an interception which was not authorised by warrant and so therefore provides no protection against unauthorised interceptions which are considered for police investigation (although no duty for Tribunal to refer to the police). Liberty also has concerns over the closed nature of the procedure: there is no oral hearing; only limited disclosure of evidence to the applicant; and no reasoned decision.

Communications Data (also regulated by Part 1 RIPA)

- The purposes for which comms data can be retrieved are wide: national security; prevention of crime; economic wellbeing; public safety; public health; collecting or assessing tax.

- no prior judicial authorisations required, only self-authorisation by a senior person in the body seeking the data
- Prior to RIPA, similar powers were being exercised by the police, intelligence services, Customs & Excise and Inland Revenue. However in 2002 the Home Office put forward an order to extend to many other public bodies (ranging from FSA, Health & Safety Executive etc). Dubbed “snoopers charter” this was eventually withdrawn and the Home Office devised a compromise that restricts access to those agencies who have some link to criminal investigation.
- In March 2008 an SI will incorporate EU Directive 2006/24/EC which allows significant scope to retain comms data for a period between 6 and 24 months. There has been a voluntary code for comms data retention between Government and communications service providers for some time already. The Government has opted for compulsory retention for 12 months
- In 2008 the Home Office trailed proposals for a centralised database of all comms data in the UK. This is expected to be consulted on in 2009. Liberty has already expressed huge opposition to such a proposal on grounds of access; proportionality; necessity; security etc.

Care Standards Act 2000

Received Royal Assent 20 July 2000

Part VII (in force 26 July 2004) introduces provisions by which the Secretary of State will establish and operate, in relation to both England and Wales, a list of persons who are considered unsuitable to work with vulnerable adults. There is a duty on providers of care services to vulnerable adults to check that prospective employees are not on the list, and to refuse employment in that field to any person included on the list. A person who seeks work in a care position while they are confirmed on the list commits an offence. The determination as to inclusion on the list is made by the Secretary of State on the basis of referrals from employers. There is no basis to test the evidence against an individual at an independent tribunal. There is a right of appeal under section 86.

Article 6(1) of the European Convention on Human Rights provides that “*in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*”

- The effect of the initial inclusion on such a list will restrict a person’s right to work in his chosen profession and infringe his Article 6 rights in the determination of his civil rights.
- The creation of such a list and the disclosure of information from the list engages the right to privacy set out in Article 8 of the European Convention on Human Rights.

Criminal Justice and Court Services Act 2000

Received Royal Assent 30 November 2000

Part III, section 57 (in force in the Metropolitan police district since 20 June 2001. For other forces see Legislation Direct) provides for the compulsory drug testing of alleged offenders after charge with a relevant offence, or where a police officer of at least the rank of Inspector has reasonable grounds to suspect a link between an offence with which a person has been charged and the misuse of a specified Class A drug, and authorises the taking of the sample at the police station, with a view to informing subsequent bail decisions of a court and referral to a drug worker.

- Prior to conviction a person is still presumed to be innocent.
- Infringement of Article 8 rights to privacy may not be justified and proportionate *prior to* conviction.

Section 46 (in force 2 September 2004) amends the Powers of Criminal Courts (Sentencing) Act 2000 to insert section 40A. This creates an exclusion order which can require an offender to stay away from a certain place or places at certain times. Apart from a requirement that an exclusion order should as far as practicable, avoid interference with religious belief, work or education, there is no restriction as to when, or in what circumstances these orders can be made. The order can be used in conjunction with electronic tagging.

- Infringements possible under Article 8 - the right to privacy, Article 11- the right to freedom of assembly.
- Interference with these rights can only be justified for the prevention of disorder or crime and must be proportionate.

Section 444 of the Education Act 1996 already provides that if a registered child of compulsory school age fails to attend school regularly, his parent is guilty of an offence and liable to pay a fine of up to £1,000. Part IV, section 72 (in force 1 March 2001) amends section 444 of the Education Act to provide that where a parent fails without good reason to secure their child's attendance at school even though they know that he is not attending they are liable to pay a fine of up to £2,500 or serve a prison sentence of up to 3 months.

- Imprisoning parents is unlikely to be of benefit to their children.
- Any imprisonment would have to take into account the right to family life under Article 8.

Freedom of Information Act 2000

Received Royal Assent 30 November 2000 (in force from 1 January 2005)

Part II sets out the circumstances in which information is "exempt information" for the purposes of the Act. There is a distinction between provisions which confer an 'absolute exemption', where the need to balance the public interest

in disclosure against the public interest in maintaining the exemption does not arise, and other exemptions whose application must be balanced against the public interest in disclosure.

- The original White Paper's 'substantial harm' test was replaced in the Act by the far weaker test of 'prejudice.'
- Wholly unjustifiable blanket exemptions for large amounts of information held by the police and other public bodies involved in investigation.
- Intelligence services are entirely exempt and are not obliged to draw up publication schemes.

Terrorism Act 2000

Received Royal Assent 20 July 2000

Replaces temporary legislation first passed in the 1970s to combat terrorism in Northern Ireland: the Prevention of Terrorism (Temporary Provisions) Act 1989, the Northern Ireland (Emergency Provisions) Act 1996, and parts of the Criminal Justice (Terrorism and Conspiracy) Act 1998.

Section 1 reworked and expanded the definition of terrorism. Formerly defined as "violence for political ends", it now includes action, used or threatened, for the purpose of advancing any "political, religious or ideological" cause. In 2008 this was extended to include a "racial" cause. Action is defined as including: violence against a person, damage to property, serious risk to the health or safety of the public or a section of the public, behaviour designed seriously to interfere with or seriously to disrupt an electronic system. All subsequent powers for the police and courts flow from this definition. Liberty opposes the breadth of the definition which, when combined with certain terrorism-specific offences, criminalizes a wide range of behaviour (i.e. the offence of encouragement of terrorism under the Terrorism Act 2006).

There are two offences to fail to comply with disclosure duties: section 19 deals with the unregulated sector and section 21A concerns the regulated sector. Section 19 and section 21A offences are committed when a person believes or suspects that another person has committed an offence under section 15 to 18 of the 2000 Act and does not disclose to a constable as soon as reasonably practicable his belief or suspicion and the information on which it is based.

Section 38B (inserted by the ATCSA 2001) creates an offence of 'failure to disclose information about acts of terrorism. It is an offence not to disclose to the police as soon as possible information which one knows or believes might be of material assistance in preventing an act of terrorism or bringing to justice a person suspected of preparing or instigating an act of terrorism.

Section 44 (in force 19 February 2001) provides that the police do not need reasonable suspicion (a requirement under the Police and Criminal Evidence

Act 1984) to stop and search a person or a vehicle if the police are operating in a designated area under special authorisation. An authorisation is given to the police “for the prevention of acts of terrorism.”

- Central London has been on rolling authority for several years allowing for the permanent use of stop and search without suspicion. Liberty takes no issue with the use of exceptional police powers but only if they are truly exceptional. Permanent authorisation of s44 powers undermines any exceptionality
- Police powers have been abused to intimidate protesters at peaceful demonstrations which did not present a terrorist threat e.g. at RAF Fairford, and at the Docklands Arms Fair. Walter Wolfgang, an octogenarian, who was removed from the Labour party conference in 2005 (after heckling Jack Straw) was prevented from returning under s44.

Gives the Secretary of State the power to proscribe organisations, and set out a range of offences connected with proscribed organisations such as: membership of a proscribed organisation (section 11) and supporting a proscribed organisation (section 12). For several of these offences the burden of proof is reversed.

The Act also created a number of other ‘lower order’ terrorism offences including –

- wearing a uniform (section 13)
- terrorist fundraising (section 15)
- Possession of an Article for Terrorist Purposes (section 57)
- Collection of information of a kind likely to be useful to a person committing or preparing an act of terrorism (section 58)

Liberty has expressed concern about many of these lower order offences which are overbroad and unfair in application.

Schedule 7 allows for detention without suspicion at ports and borders for up to 9 hours.

Section 41 and Schedule 8 deal with the treatment, review and extension of detention of those arrested for offences relating to terrorism. The Act originally allowed the police to detain people arrested for terrorism offences for 7 days but this was extended to 14 days in 2003 and further extended to 28 days under the Terrorism Act 2006. The Government has recently tried to re-extend the detention limit to 42 days but the proposal was rejected by the House of Lords. When seeking to re-extend pre-charge detention the Government makes a play of the judicial safeguards for extended detention under the 2000 Act. However, suspicion is such a low “evidential” hurdle that it is not really capable of being tested by the courts or challenged by the suspect or their lawyers. Any proper contest between defence and prosecution or any true scrutiny by a court is not really possible in the absence of hard evidence. It could not amount to any more than second-guessing a police officer’s hunch. In fact, the law recognizes that the most that judicial oversight can reasonably achieve before charge is to ensure (1)

that there is indeed a police investigation ongoing and (2) that the police are carrying out this investigation diligently and expeditiously

1999

Immigration & Asylum Act 1999

Received Royal Assent 11 November 1999

Part I of the Act extends the criminal offence of trying to enter or remain in the UK using “deception” to include asylum seekers and their representatives who “knowingly” make false statements on their behalf. (In force 14 February 2000.)

- Contrary to Art 31 of the 1951 UN Convention on Refugees, which recognises that refugees are often forced by the circumstances of their persecution to escape using false documents.

Part III (now repealed by the Nationality and Immigration Act 2002 – effective 10 February 2003) introduced changes to the way asylum seekers were detained. While the provisions improved access to bail and there was a general presumption in favour of bail, the provisions did not address our main concern that asylum seekers should not be detained like criminals, when they have not committed a criminal offence. Many asylum seekers are in fact granted refugee status or leave to remain.

- The detention of asylum seekers is a breach of their article 5 right to liberty.

Part VI of the Act (in force 3 April 2000, some parts amended by the Nationality, Immigration & Asylum Act 2002) makes changes to the way asylum seekers are supported while they await a decision on their claim. All entitlement to benefits is removed. The National Asylum Support Service is established instead. Support consists of adequate accommodation (if needed) plus vouchers and some cash (£10 per week per person) to meet essential living needs. Accommodation could be anywhere in the UK. No alternatives are offered if the asylum seeker refuses the allocated accommodation.

- Liberty strongly opposes the voucher system – some asylum seekers are forced to beg and turn to crime in a desperate bid to get cash. This criminalises asylum seekers and leads to tensions in the community with the perception that all asylum seekers are beggars and criminals.
- Housing asylum seekers in remote or rural communities where there is no community support, legal representation or existing ethnic minority population results in at best isolation, deprivation and hardship for the asylum seeker and at worst racism and abuse from the receiving community unused to large immigrant populations.

Part VII (in force 14 February 2000) of the Act gives sweeping powers to immigration officers who are given similar powers as the police to arrest, search and detain asylum seekers and to use “reasonable force” in carrying out any of their duties.

- Unlike the police, there are no clear lines of public accountability or individual safeguards when immigration officers carry out these powers, nor any commitment to provide specialist training.
- Immigration officers are being given broader powers than the police to use force, who can only use reasonable force in specific situations.

Liberty