



December 2015

NUJ submission - Joint Committee on the Draft Investigatory Powers Bill

1. The National Union of Journalists (NUJ) is the representative voice for journalists and media workers across the UK and Ireland. The union was founded in 1907 and has 30,000 members. We represent staff, casuals and freelancers working at home and abroad in the broadcast media, newspapers, news agencies, magazines, books, public relations, communications, online media and photography.
2. The NUJ welcomes the opportunity to provide evidence to the joint committee in response to the draft Investigatory Powers Bill (IPB).
3. The history of the police and intelligence agencies in the UK over the last 50 years has included the monitoring, infiltration and targeting of journalists, trade unionists and social justice campaigners. For example, in November 2014, six NUJ members launched a collective legal challenge in response to finding themselves listed on a secret police database of "domestic extremists". The database includes intimate details about their lives, including their work, their medical history and even their sexuality. Their lawful journalistic and union activities have been monitored and recorded.
4. It is in this context that there is a compelling case for proper parliamentary scrutiny and debate about the draft IPB and there is a need for much stronger oversight of surveillance powers by both parliamentarians and the judiciary.
5. It is the state's concerns that dominate the draft IPB whilst the associated human rights, civil liberties, privacy and related concerns of UK citizens are mostly absent from the proposed legislation. However, this submission is largely focused on the impact of the IPB on journalists and journalism.
6. In the UK, journalists have been spied on, their phone records secretly pored over and their communications seized. This has significant implications for NUJ members and for upholding the union's longstanding ethical code of conduct. The NUJ's code has established the main principles of UK and Irish journalism since 1936. The code is part of the union rules; members support the code and strive to adhere to its professional principles. The NUJ code of conduct includes the following clause:
7. "A journalist protects the identity of sources who supply information in confidence and material gathered in the course of her/his work."
8. Michelle Stanistreet, NUJ general secretary, said: "We are defending the core principle enshrined in the NUJ's code of conduct - the protection of sources. It is a

vital aspect of a free press - that whistleblowers and sources need to be able to come forward and share information they believe the public should know about in the certain knowledge that their identities will be protected.

9. "We are raising awareness of the growing threat to the ability of journalists to do their jobs safely, to guarantee their material and to protect their sources. Without that protection, we simply won't have a functioning free press.
10. "We cannot have a situation where journalists are seen as instruments of the state - their work should not be used by the authorities as a short cut in their investigations, and their sources shouldn't in any way be compromised or identified."
11. In relation to the NUJ's code of conduct, we believe the current proposals contained within the draft IPB do not allow journalists to protect the identity of sources or provide sufficient protections for journalists' materials and communications.
12. The right to protect journalistic sources is recognised by international law. It has been recognised by the United Nations, the Council of Europe, the Organisation of American States and the Organisation for Security and Cooperation in Europe. The European Court of Human Rights said in several of its decisions that it's a key element of freedom of expression. In addition, the NUJ has historically secured legal precedent on the protection of sources in the Goodwin v UK 1996 case. The Goodwin judgement stated:
13. "Protection of journalistic sources is one of the basic conditions for press freedom"
14. In order to be able to play the role of watchdogs, as qualified by the European Court of Human Rights, journalists need to rely on sources of information. Some of these sources are official and known, but more often, they're confidential and secret. Without protection, some informers will refuse to speak out, for fear of being exposed.
15. One of the most serious consequences of the lack of protection is the impact on the physical integrity of journalists. This applies to journalists who work in dangerous environments such as war zones and/or those who investigate organised crime. If journalists are perceived as informers to the authorities, or as future witnesses in a trial, they can become a target. Furthermore, a lack of safeguards for all journalists will have profound consequences for the public's right to know. As Chris Frost, the chair of the NUJ ethics council, has said: "It is difficult to measure the extent of stories from whistleblowers because they are anonymous but in my experience virtually every serious investigation is launched on the back of a source or whistleblower who needs to be kept anonymous for their protection."
16. It is the NUJ's view that the draft IPB should include stronger measures to safeguard journalists and their sources. There is no fundamental difference between the authorities asking for a journalists' physical contacts book or footage and their telephone and communications records. The effect on journalists and sources is exactly the same and the same legal safeguards must cover both.

17. Source protection does not just apply to the identity of the source but also to all matters relating to and communications between the journalist and the source. This includes the person's name; personal data, voice and image. It also includes the unpublished content of information and the circumstances of acquiring the information.
18. The NUJ is calling for specific changes to the IPB to include:
 - Automatic and mandatory prior notification
 - An independent and judicial process
 - Mechanisms to challenge an application with the right of appeal
19. Under the Police and Criminal Evidence Act (PACE) journalists are notified when the authorities want to access their material and sources, and journalists have the ability to defend their sources in an open court with the chance to challenge and appeal the application and related decisions. Unlike PACE, both RIPA and the draft IPB do not apply the same protections and safeguards.
20. In the draft IPB it states that "in making an application for data to identify a journalistic source, the applicant is not required to notify either the person to whom the applications relates i.e. the journalistic source, nor that person's legal representative".
21. Without prior notification a journalist and/or media organisation will not have an opportunity to challenge this behind-the-scenes request. This means that the public interest and press freedom arguments for maintaining source protection are never put forward.
22. The NUJ has routinely tackled and challenged cases where the police have served production orders on journalists - we've funded and supported journalists through lengthy and stressful legal processes in which they have successfully stood up for their sources, and stood by the NUJ's code of conduct. But if journalists don't know their data is being snooped on and their sources spied on, how can a journalist defend themselves and the long-held principles they stand for?
23. Dominic Ponsford, editor of Press Gazette, has also emphasises the risks involved: "If law enforcement are able to secretly grab the phone records of journalists and news organisations then no confidential source is safe and pretty much all investigative journalism is in peril."
24. In the case of Tom Newton Dunn, the police used RIPA to access his phone records in secret. They did not notify him that they had accessed his material or sources. The police obtained the phone records without notification or consent and in other RIPA cases, when the police have been spying on journalists no journalist was informed in advance.
25. Roy Mincoff, NUJ legal and industrial officer, said: "To continue to allow the authorities to access journalists' data and therefore sources will have a serious chilling effect on those who would otherwise reveal corruption, crime, abuse and wrongdoing by public and private bodies. Journalists are the public watchdog, with a duty to inform the public. The public has a right to be informed."

26. In November 2015 and when asked about protection of journalistic sources in parliament, the home secretary Theresa May said: "We will put into this legislation what we put into PACE code earlier this year, which is that for access to communications data to identify a journalist's source, it will require judicial authorisation."
27. Clause 61 of the draft IPB refers to the approval of a "judicial commissioner" before accessing journalists' communications data yet there is no provision for a journalist or media organisation to be able to contest an application before a judge (or appeal) in advance of the investigatory power being granted. The draft IPB appears to propose to review a decision that has already been taken and merely check if the correct procedure has been followed. This is not the same as a judge hearing the arguments for and against.
28. In the draft IPB this oversight will only apply for the purpose of an application that attempts to identify a journalistic source and the judicial authorisation set out in the draft IPB will only cover the police and not the intelligence services. There is no prior right of notification for journalists or media organisations where their material is either deliberately, incidentally, collaterally or accidentally sought or obtained, whether by the police or by intelligence agencies and the proposed measures can be bypassed by using the urgency procedures.
29. The NUJ believes the production order procedures set out in PACE - in which a judge makes the decision and has the benefit of evidence and argument from the journalist as well as the state - offers better safeguards and protections than what is proposed in the draft IPB. This is because PACE includes the right to challenge and appeal. Unlike PACE, the draft IPB contains no reference to a right of source protection that can only be displaced by an overriding public interest. There are also no measures proposed in the draft IPB that would compel the police to exhaust other lines of inquiry in the first instance and in advance of an application that attempts to identify a journalistic source.
30. Gavin Millar QC has said: "There must be an overriding requirement in the public interest - in order to remove the source protection. This is a very high hurdle and is not specified in the bill... Under the bill the journalists' data can be obtained in any criminal investigation, however minor.
31. "The intelligence services are excluded from the requirement to obtain even this (flawed) form of judicial approval. Yet the convention law applies to them just as much as to the police who obtain source-identifying information.
32. "Both under the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000 when the police apply for orders for material in the possession of the journalist to be handed over (known as production orders) there must be a hearing before a judge at which the journalist is entitled to be heard.
33. "The worry is that the police will now start using these powers routinely to identify sources instead of making PACE/TA applications for the journalist's material."
34. The draft IPB provides an easier route for the authorities to identify a journalists' source when it is compared to the tried and tested legislative framework that

already exists under PACE. The NUJ is also concerned by the powers on "equipment interference" that enable the authorities to access computers or other devices. This means the authorities would have control over targeted devices and access to any information stored. This information could include documents, emails, diaries, contacts, photographs, internet messaging chat logs, and the location records on mobile equipment. It would also mean having powers to access anything typed into a device, including login details/passwords, internet browsing histories, other materials and communications. Draft documents and deleted files could also be accessed. In addition, the microphone, webcam and GPS-based locator technology could be turned on and items stored could be altered or deleted. These powers accompanied by the proposals to retain 12 months' of website data of all UK citizens have severe and detrimental implications for investigative journalism.

35. In conclusion, the draft IPB needs better safeguards across the entire draft bill - not just in the section relating to the interception of communications data. For example, the protections specified for journalists should also apply to related powers of collection, retention and examination. The revelations that the police had been routinely using - or rather misusing - the RIPA codes to secretly access information on journalists and their sources sent genuine shock waves throughout our industry. It has also united organisations and individuals that often do not rub shoulders together - just within journalism. We are now starting to see the same alliance speak out to raise genuine concerns about the lack of safeguards proposed in the draft IPB so we hope the joint committee will be persuaded by our specific concerns and the alternative proposals suggested.