



Submission to the Joint Committee on the Draft Investigatory Powers Bill

1. The Network for Police Monitoring (Netpol) is a network of organisations with an interest in monitoring or observing policing. This includes those based within a set community, such as the Newham Monitoring Project, and those that work directly with protest, such as the Green and Black Cross, who train and support legal observers. Netpol acts as a focus for campaigns relating to aspects of policing that are viewed as excessive or oppressive.
2. This submission is concerned with the legality of the proposed Bill, and provides a response, in particular, to the following questions posed by the Joint Committee on the Draft Investigatory Powers Bill:

Are the powers compatible with the Human Rights Act and the ECHR? Is the requirement that they be exercised only when necessary and proportionate fully addressed? Are they sufficiently clear and accessible on the face of the draft Bill?
3. This submission addresses the exercise of surveillance powers by law enforcement agencies. It does not address the role of the security services or the use of bulk interceptions of bulk datasets.

Are the powers compatible with the Human Rights Act and the ECHR?

4. Our concern is that the Bill enables highly intrusive surveillance practices in response to activities protected under articles 10 and 11 ECHR (rights to freedom of expression and assembly) and that the requirements of legality are not met. These requirements are such that that legislation must ensure that the scope of discretion to be exercised by the state is made clear, and that there is an adequate indication of the nature of the offences that may give rise to such intrusive activities¹.

1 This requirement has been frequently stated in the case law of the ECtHR. See, for example, *Weber v Germany* (2008) Application no. 54934/00 and *Malone v UK* Application no. 8691/79. In *Malone* the court held that 'the law had to be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and conditions on which public authorities are empowered to resort to...secret and potentially dangerous interference with the right to respect for private life and correspondence'. In *Weber*, the court also considered that minimum safeguards in relation to the exercise of state surveillance powers should include the 'nature of the offences' likely to give rise to intrusive surveillance activities.

5. The Investigatory Powers Bill is not clear as to the circumstances in which intrusive surveillance may be carried out in relation to collective activity. While the Bill suggests that practices of interception and equipment interference may be carried out only for the purpose of addressing serious crime, the effect of the Bill will be that protest groups carrying out collective activities may be subject to such surveillance for much broader purposes, including the prevention and detection of minor offences.
6. The broad scope of the Bill in relation to the surveillance of collective activities and the meaning given to 'common purpose' means that it falls to considerations of proportionality and necessity to constrain state actions. Policing units, however, will retain a great deal of operational discretion. Without further guidance as to the circumstances in which the surveillance of protest groups will be both necessary and proportionate, individuals exercising fundamental rights will not have adequate protection from arbitrary state actions.

Sufficiently clear and accessible

7. The scope of state powers in relation to the surveillance of political protest is neither clear nor accessible. The Bill enables policing bodies to carry out the activities of equipment interference and interception of communications for the purpose of the prevention and detection of *serious crime*. However, the definition of *serious crime* adopted for the purposes of the Bill potentially encompasses protest activity that includes only *minor* criminality.
8. The Bill adopts the definition of serious crime used in RIPA 2000. It includes conduct (which would constitute one or more criminal offences) that:
 - 8.1.1. '...involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose'².
9. The effect of this provision is that it applies to any protest activity where some form of criminality is conducted by a 'large number of persons' with 'common purpose'. This appears to create a lower threshold for the use of state surveillance in the context of mass protest - on this basis, *any* criminal activity, no matter how minor, which is conducted by a large number of people falls into the category of *serious crime*.
10. The scope of the statutory purpose of *preventing and detecting serious crime* is therefore highly uncertain. Does *serious crime* include, for example, a university occupation by students, or a mass protest in a quasi-public place such as a privately run shopping mall, protests which may include offences of aggravated trespass by virtue of them taking place on private land? Does it include environmental protests, such as those taking place around the country in opposition to hydraulic fracturing which have frequently featured arrests for obstruction of the highway?

2 In 2000 Liberty warned that this definition 'extend[ed] the net of surveillance indiscriminately to participants in legitimate collective activity - industrial action, organised protest and so on - who are not themselves suspected of inherently serious wrongdoing.' We would agree with that assessment.

11. We suggest that these provisions are not compatible with the ECHR, and that there is an urgent need to ensure that interception of communications and equipment interference are genuinely restricted to the prevention and detection of serious offences.
12. We have additional concerns about the use of communications data in relation to public protest and political activism. The lower threshold of preventing and detecting *crime* provides significant operational discretion to the authorities in relation to protest activity. We are concerned that monitoring of such data in relation to protest activity will become routine, justified by a wide and generalised interpretation of the need to *prevent crime*.
13. We suggest that any interference with protest activities on the part of the state should have a higher threshold than the broad purpose of the *prevention of crime*.

Necessity, proportionality and law enforcement discretion

14. The scope of surveillance activities are, of course, further limited by the requirements of necessity and proportionality. However, in the absence of further guidance on the circumstances in which surveillance may be necessary and proportionate in the context of public protest, we do not consider this to be adequate protection.
15. Law enforcement bodies retain significant operational discretion in assessing the proportionality and necessity of surveillance operations, and it is not clear that oversight bodies will have either the capacity or capability to challenge operational decision making. The role of oversight bodies appears to be largely focused on procedural issues and in considering whether there is a 'less intrusive' means of obtaining information.
16. The track record of specialist policing bodies in acting proportionately in relation to the surveillance of protest is not reassuring. The lead is taken by the National Domestic Extremism and Disorder Intelligence Unit (NDEDIU), previously the National Public Order Intelligence Unit (NPOIU). The activities of this unit and its predecessors in authorising the deployment of undercover police officers within protest groups has been the subject of several reviews and is currently under examination by a public inquiry.
17. We are further concerned by the approach taken by the NDEDIU to the classification of 'domestic extremism'. While claiming to have tightened up the definition of domestic extremism in response to criticism by HMIC in 2012, Netpol has evidence that the categorisation continues to be applied to single issue protest groups that engage in low-level criminality, including anti-fracking protest groups which adopt peaceful (albeit sometimes unlawful) methods of protest.
18. We are therefore concerned that surveillance may be operationally justified against a wide range of protest groups on the basis that it is necessary (and proportionate) to the need to challenge 'domestic extremism'. Given that protesters and protest groups are unlikely to be able to challenge such classification, this may lead to the excessive and arbitrary use of state powers.
19. We suggest that there needs to be a much clearer indication of what may be considered to be 'necessary and proportionate' surveillance of activities protected by Article 10 and 11.

Thematic warrants

20. We have particular concerns relating to the availability of thematic warrants to law enforcement agencies. The Bill enables police units to obtain targeted warrants relating to:
 - 20.1.1. ‘...a group of persons who share a common purpose or who carry on, or may carry on, a particular activity.’
21. In the context of protest policing, this extends the use of surveillance activities to any individual associated with a protest groups that meets the definitions discussed above. Not only does the surveillance extend to individuals themselves engaging in (possibly low-level) criminal activity, it arbitrarily extends it to all individuals believed to share a ‘common purpose’ with them.
22. This provides policing bodies with wide-sweeping powers to undertake surveillance on political activists and protest groups. We suggest that this cannot be compliant with ECHR, nor acceptable in any democratic society.

Netpol

info@netpol.org

www.netpol.org

Submitted 21st December 2015.