

BIG BROTHER WATCH

**Big Brother Watch's briefing
on benefits and financial
mass surveillance powers in
the Data Protection and
Digital Information Bill**

May 2024

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

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RECOMMENDATION: We urge peers to oppose the Question that Clause 128 and Schedule 11 (power to require information for social security purposes) stand part of the Data Protection and Digital Information Bill.

SUMMARY: 30 KEY ISSUES WITH THE FINANCIAL SPYING POWERS

1. The Government has existing powers to investigate the accounts of fraud suspects.
2. This extraordinary power is ineffective and entirely disproportionate to the revenue the Government expects to raise via its use.
3. It must also be recognised that DWP is currently responsible for record underpayments.
4. This power would force third party organisations to trawl *all* customers' accounts in search of "matching accounts".
5. This is a mass data trawling power targeted at recipients of all benefits, including of the state pension – approximately 40% of the population – as well as people linked to claims, including landlords .
6. This would be a precedent-setting power that enables intrusive generalised financial surveillance across the population - *not* restricted to serious crime, or even crime - but in relation to general administration.
7. Even in the context of crime, this suspicionless surveillance power would be an assault on the presumption of innocence.
8. The Information Commissioner does not currently view these powers as proportionate – in which case, they may be unlawful and a breach of individuals' right to privacy protected by the Human Rights Act. Legal advice from Matrix Chambers also warned that the powers could breach privacy rights as well as individuals' rights to freedom of expression, association and assembly, and protection from discrimination.
9. The proposed power contains no data minimisation requirement and no oversight of the secret search criteria or algorithms involved.
10. The power would create data protection conflicts for banks and other affected third parties, requiring them to breach their duty of confidence to customers.
11. The power is particularly intrusive, as the information monitored includes special category data that invokes extra protections.
12. The proposals could impact EU adequacy.
13. The power would create data security risks.
14. Thousands of decisions regarding the collection and reviewing of private financial information of people receiving benefits will be automated.

15. There are no provisions for algorithmic transparency and accountability.
16. With the constant scanning of tens of millions of accounts in relation to often complex claims, false positive matches for fraud or error are highly likely.
17. Financial institutions' 'Suspicious Activity Reports' already have a very high false hit rate.
18. A related trial indicated that this extraordinary power is unlikely to be an effective measure.
19. Errors resulting from the proposed surveillance power are likely to have particularly serious negative consequences for welfare recipients.
20. The Government must learn lessons from the Horizon scandal.
21. The Public Accounts Committee raised concerns about DWP's lack of algorithmic transparency.
22. The Equality and Human Rights Commission (EHRC) has called on parliament to reject the powers entirely, as the privacy intrusion and risks of other consequential harms will have the greatest impact on those in receipt of benefits, many of whom are in receipt of benefits due to a protected characteristic such as disability or age.
23. In addition to landlords, some banks and other third party organisations may choose not to accept individuals in receipt of benefits, or treat them less favourably.
24. DWP has not done enough to assess the risks of the proposed policy discriminating against protected groups.
25. This power could decimate the private rental market for recipients of benefits.
26. Third parties face fines for failures to comply.
27. The proposed power will create a significant resource burden for affected third parties.
28. Smaller third party organisations may face significant compliance challenges.
29. This rushed power has had inadequate scrutiny as it was introduced at Report Stage in the House of Commons – almost 9 months after the DPDI Bill was introduced.
30. The Government cannot offer Parliament or the public reassurance by deferring vital legal protections in favour of guidance in a possible future code of practice.

EXISTING POWERS

1. **The Government has existing powers to investigate the accounts of fraud suspects.** It is right that fraudulent uses of public money are robustly be dealt with and the government already has significant powers to review the bank statements of welfare fraud suspects – for example, under the Social Security Fraud Act 2001. Under current rules, the Department for Work and Pensions (DWP) is able to request bank account holders’ bank transaction details on a case-by-case basis if there is reasonable grounds to suspect fraud. On DWP’s admission:

“DWP currently has the power to compel prescribed information holders to share data on individuals if fraudulent activity is suspected but does not have the power to compel Third Parties to share data that is signalling potential signs of fraud and error on ‘persons unknown’ at scale.”¹

We would argue that such a vague and intrusive surveillance project has not been enabled thus far for very good reason.

There are already multiple powers and processed by which DWP exchanges data with third parties. For example, HMRC shares banking data with DWP on an annual basis; the Proceeds of Crime Act 2002 requires banks and building societies to notify law enforcement of suspicious activity; open banking enables consumers to give third parties access to their financial accounts; private companies that administer the UK’s banking infrastructure can see transactional data; and Credit Reference Agencies can view credit histories.² The Government must reduce benefit fraud and error – but there are more effective and proportionate means, including the proper use of existing powers, of doing so.

2. **This extraordinary power is ineffective and entirely disproportionate to the revenue the Government expects to raise via its use.** The Government’s *own* analysis shows that, if it works as hoped, this unprecedented bank intrusion is expected to generate approx. £250m net annual revenue – this would be mean recovering less than 1/34th or less than 3% of the estimated annual loss to fraud and error (the ‘best estimate’ is still only £320m)³.

1 Department for Work and Pensions, Third Party Data Gathering Impact Assessment (IA) (September 2023), p.10:
https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf 3.

2 Ibid.

3 Ibid.

3. It must also be recognised that DWP is currently responsible for record underpayments. In comparison, benefits *underpaid* by the Government were a record £3.3bn in 2022-3, leading to criticism from the National Audit Office.⁴ The Public Accounts Committee recently raised particular concern about

“yet another historic underpayment of State Pension, which [DWP] estimates may have left some 210,000 pensioners out of pocket by a total of £1.3 billion. (...) This is in addition to the previous underpayment of £1.2 billion affecting 165,000 pensioners due to historical errors by DWP.”⁵

The State Pension is one of the benefits the government plans to target with this surveillance power, However, DWP is only seeking to use the proposed power to “recover monies owed to DWP”⁶ – not to pay the billions of pounds underpaid and owed to citizens. Whilst both are important, fraud costs the public purse whereas underpayment errors can cost lives. However, neither of these complex issues justifies or can be appropriately addressed by mass financial surveillance.

MASS SURVEILLANCE

4. This power would force third party organisations to trawl all customers' accounts in search of “matching accounts”. This new power would amend the Social Security Administration Act 1992 ('SSA') to allow DWP to access the personal data of welfare recipients by requiring the third party served with an account information notice (AIN) – such as a bank, building society or online marketplace – to conduct mass monitoring without suspicion of fraudulent activity. Once issued, an AIN requires the receiver to give the Secretary of State, or any staff member who has appropriate responsibility to exercise the power, the names of the holders of accounts (sub-paragraph 2(1)(a)). In order to do this, the bank will have to process the data of all bank account holders and run automated surveillance scanning according to secret search criteria supplied by DWP. Lord Vaux warned that the proposal “constitutes a worrying level of creep towards a surveillance society”.⁷

4 Benefits claimants in UK were underpaid by record £3.3bn last year – Rupert Jones, the Guardian, 6 July 2023: <https://www.theguardian.com/society/2023/jul/06/benefits-claimants-in-uk-were-underpaid-by-record-33bn-last-year>

5 House of Commons Committee of Public Accounts, The Department for Work and Pensions Annual Report and Accounts 2022-2023 (6 December 2023), p.3: <https://committees.parliament.uk/publications/42434/documents/210942/default/>

6 Department for Work and Pensions, Third Party Data Gathering Impact Assessment (IA) (September 2023, p.1): https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf

7 HL Deb 19 December 2023 vol. 834, col.2185: <https://hansard.parliament.uk/lords/2023-12-19/debates/2960AC9B-D86E-4EA1-8E4E-F3198BEE702F/DataProtectionAndDigitalInformationBill>

5. **This is a mass data trawling power targeted at recipients of all benefits, including of the state pension – approximately 40% of the population – as well as people linked to claims, including landlords.** Schedule 11 of the DPDI Bill would add new Schedule 3B to the SSA; sub-paragraph 2(3)(a) states that a “matching account” that can be flagged to the government includes any account into which any benefit is paid, and the other accounts of that account holder. Approximately 22.6 million people are in receipt of a benefit – around 40% of the population.⁸ Further, because in some circumstances benefits can be paid into a third party’s bank account, such as a parent, partner, appointed person, joint account, or landlord (where claimants opt for landlords to receive their housing benefit directly), according to paragraph 2(5) all of these people’s accounts can also be “matching accounts” eligible for surveillance, despite the fact they are not benefits claimants. Lord Sikka highlighted the alarming reach of the proposals during Second Reading (HL):

“Now comes snooping and 24/7 surveillance of the bank, building society and other accounts of the sick, disabled, poor, elderly and unfortunate, all without a court order [...] Can the Minister explain why people not receiving any social security benefits are to be snooped upon?”⁹

6. **This would be a precedent-setting power that enables intrusive generalised financial surveillance across the population - not restricted to serious crime, or even crime - but in relation to general administration.** Paragraph 1(2) of proposed new Schedule 3B of the SSA imposes only one purpose limitation: that the Secretary of State’s power to issue an AIN “may be exercised only for the purpose of assisting the Secretary of State in identifying cases which merit further consideration to establish whether relevant benefits are being paid or have been paid in accordance with the enactments and rules of law relating to those benefits.” This is unlike any other surveillance legislation – there is no crime threshold to merit the financial privacy intrusion at all. The Government has been explicit that the power is designed to “proactively target potential fraud” (our emphasis) as well as “error”, which accounts for almost a quarter of the cost of overpayments, and encapsulates DWP’s own error. It would be wholly inappropriate, and set a disturbing precedent, to use mass financial surveillance powers to administrate a government department’s errors. The Constitution Committee reported that it is “concerned by the breadth of these

8 Department for Work and Pensions, DWP benefits statistics: August 2023 (15 August 2023): <https://www.gov.uk/government/statistics/dwp-benefits-statistics-august-2023/dwp-benefits-statistics-august-2023>; HL Deb 19 December 2023, vol 834, col 2210: <https://hansard.parliament.uk/lords/2023-12-19/debates/2960AC9B-D86E-4EA1-8E4E-F3198BEE702F/DataProtectionAndDigitalInformationBill>

9 HL Deb 19 December 2023 vol. 834, col.2193: <https://hansard.parliament.uk/lords/2023-12-19/debates/2960AC9B-D86E-4EA1-8E4E-F3198BEE702F/DataProtectionAndDigitalInformationBill>

provisions, which empower the Government to demand access to individual bank accounts without grounds for suspicion.”¹⁰

DWP references Section 40A of the Immigration Act 2014 as a comparative legal basis for these proposals.¹¹ Section 40A requires banks and building societies to check accounts to identify any that may be held by disqualified persons named by the Home Office (people who are in the UK without leave to remain and whom the Home Secretary considers should not be permitted to open a current account). DWP's impact assessment suggests that these powers are similar in that they require banks and financial institutions to check consumer records, match against key criteria and report relevant data back to investigation and enforcement agencies.¹² This comparison is a complete misnomer. Checking the names of account holders who are not legally allowed to be in the country or to have a bank account is different to searching the accounts of the entire population, without suspicion, against secret criteria.

7. **Even in the context of crime, this suspicionless surveillance power would be an assault on the presumption of innocence.** Big Brother Watch finds it wholly inappropriate for the UK Government to order private banks, building societies and other third party organisation services to conduct mass, algorithmic, suspicionless surveillance. These unprecedented powers were accurately described by Lord Vaux as “draconian”¹³ and by Baroness Young as a “Big Brother mechanism”.¹⁴ The government should not intrude on the privacy of anyone’s bank account in this country without very good reason and a strong legal justification, whether a person is receiving benefits or not. People who are disabled, sick, carers, looking for work, or indeed linked to any of those people should not be treated like criminals by default. These proposals do away with the long-standing democratic principle in Britain that intrusive state surveillance should follow suspicion rather than vice versa – as such, the power undermines the presumption of innocence.

ARTICLE 8 PRIVACY AND DATA PROTECTION ISSUES

¹⁰ Data Protection and Digital Information Bill – Select Committee on the Constitution, 2nd Report of Session 2023-4, 25 January 2024, para. 18:

<https://committees.parliament.uk/publications/43076/documents/214262/default/>

¹¹ Department for Work and Pensions, Third Party Data Gathering Impact Assessment (IA) (September 2023):

https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf

¹² DSIT, 'Impact assessment: Data Protection and Digital Information Bill: European Convention of Human Rights Memorandum',

para.68:https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf

¹³ HL Deb 19 December 2023 vol. 834, col. 2184-2185: <https://hansard.parliament.uk/lords/2023-12-19/debates/2960AC9B-D86E-4EA1-8E4E-F3198BEE702F/DataProtectionAndDigitalInformationBill>

¹⁴ HL Deb 19 December 2023 vol. 834, col. 2179-2180: <https://hansard.parliament.uk/lords/2023-12-19/debates/2960AC9B-D86E-4EA1-8E4E-F3198BEE702F/DataProtectionAndDigitalInformationBill>

8. **The Information Commissioner does not currently view these powers as proportionate – in which case, they may be unlawful and a breach of individuals’ right to privacy protected by the Human Rights Act. Legal advice from Matrix Chambers also warned that the powers could breach privacy rights as well as individuals’ rights to freedom of expression, association and assembly, and protection from discrimination.** The Information Commissioner, who has responsibility for enforcing data protection legislation including the UK GDPR, has said that he has “not yet seen sufficient evidence that the measure is proportionate” and acknowledged that empowering DWP to obtain such financial details would engage Article 8 of the ECHR, as financial information pertains to individuals’ private lives.¹⁵ Indeed, the Information Commissioner further stated that he, does not believe the current drafting satisfies the proportionality requirement, and has “concerns that it could be interpreted more widely.”¹⁶

Legal advice produced by privacy experts Dan Squires KC and Aidan Wills of Matrix Chambers warned that the powers could reveal information about people’s movements, opinions, and medical information.¹⁷ The legal advice raised questions as to why the proposed financial surveillance powers, unlike comparable investigatory powers, lack “anything like the same” legal safeguards and oversight, describing the discrepancy as “striking” and concluded: “In absence of these safeguards, it is difficult to see how the exercise of this power could ever be in accordance with the law”.

Such bank intrusion powers are highly vulnerable to mission creep/being repurposed for further policy functions. In Big Brother Watch's view, the powers are disproportionate and in fact privacy-altering.¹⁸

9. **The proposed power contains no data minimisation requirement and no oversight of the secret search criteria or algorithms involved.** While the explanatory notes offer search criteria examples of capital holdings or the legal limit for abroad stays, DWP’s impact assessment notes that “the power is not limited to a specific type of data”.¹⁹ Whilst DWP may claim the search

15 Information Commissioner’s Further Response to the Data Protection and Digital Information (No. 2) Bill: (18 December 2023): <https://ico.org.uk/media/about-the-ico/consultation-responses/4027809/dpdi-commissioner-further-response-231218.pdf>

16 Information Commissioner’s view on the Data Protection and Digital Information Bill (DPDI Bill) – Lords Committee stage (March 2023): <https://ico.org.uk/about-the-ico/information-commissioner-s-response-to-the-data-protection-and-digital-information-bill/information-commissioner-s-view-on-the-dpdi-bill/>

17 Legal opinion re. financial surveillance provisions under the Data Protection and Digital Information Bill – Dan Squires KC and Aidan Wills, Matrix Chambers, 11 April 2024: <https://bigbrotherwatch.org.uk/wp-content/uploads/2024/04/DPBIB-Financial-Surveillance-Matrix-Legal-Advice-for-Big-Brother-Watch.pdf>

18 Information Commissioner’s Further Response to the Data Protection and Digital Information (No. 2) Bill: (18 December 2023): <https://ico.org.uk/media/about-the-ico/consultation-responses/4027809/dpdi-commissioner-further-response-231218.pdf>

19 Data Protection And Digital Information (no. 2) Bill – Explanatory Notes, p.134-135, para.1142, 7th December 2023: <https://bills.parliament.uk/publications/53323/documents/4144>; Department for Work and Pensions, DWP benefits statistics: August 2023 (15 August 2023): <https://www.gov.uk/government/statistics/dwp->

criteria will be limited to eligibility criteria, this is not stipulated on the face of the Bill. The Bill in fact permits very broad search criteria, given that the broad purpose of the regime is “identifying cases which merit further consideration” in relation to “potential” fraud and error. Further, in proposed new Schedule 3B to the SSA, sub-paragraphs 2(1)(b) and 2(1)(c) state that an AIN requires “other specified information relating to the holders of those accounts” and other connected information “as may be specified”. This would allow for an incredibly broad scope of information to be requested and stands in contrast to the GDPR principle of data minimisation.²⁰ The lack of legislative limitations would allow for extensive information about a person to be collected and means that the scope of scanning criteria could change at any time. Further, there is no oversight of the secret criteria that will be searched for using mass algorithmic surveillance. These concerns are mirrored in the Information Commissioner’s published opinion, who considers that the drafting of the powers “leaves it open to being interpreted and applied more widely than DWP’s stated intention”.²¹

10. The power would create data protection conflicts for banks and other affected third parties, requiring them to breach their duty of confidence to customers. Although paragraph 4 of proposed Schedule 3B to the SSA exonerates banks from breaches of confidence that arise from complying with an AIN, it is framed in a circular way. Paragraph 4 expressly states that the power to issue an AIN does not authorise the “processing of personal data that would contravene the data protection legislation” – but also stipulates that “in determining whether processing of personal data would do so, that power is to be taken into account” (para. 4(2)(a)). David Naylor and Malcolm Dowden of law firm Squire Patton Boggs assessed the legal uncertainty under UK GDPR arising from this as follows:

“While that provision appears to mean that a bank could not rely on Article 6(1)(c) (“processing is necessary for compliance with a legal obligation to which the controller is subject”), it would potentially be able to rely on Article 6(1)(f) (“legitimate interests”) as its lawful basis for disclosure. That position would be somewhat uncomfortable for the bank as it would be open to individuals to object to the bank’s reliance on

[benefits-statistics-august-2023/dwp-benefits-statistics-august-2023](https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf)

20 Department for Work and Pensions, Third Party Data Gathering Impact Assessment (IA) (September 2023): https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf

21 Information Commissioner’s view on the Data Protection and Digital Information Bill (DPDI Bill) – Lords Committee stage (March 2023): <https://ico.org.uk/about-the-ico/information-commissioner-s-response-to-the-data-protection-and-digital-information-bill/information-commissioner-s-view-on-the-dpdi-bill/>

legitimate interests, requiring a potentially costly and time-consuming balancing exercise in response to each objection received.”²²

A “legitimate interest” requires a purpose, necessity and balancing test – we believe the plan would fail to meet these tests. A reliance on “legitimate interests” to justify this extraordinary surveillance power is another way in which it is likely to be vulnerable to legal challenges.

11. The power is particularly intrusive, as the information monitored includes special category data that invokes extra protections. Information monitored and exchanged under AINs would give a detailed and potentially highly invasive picture of the private lives of those affected – especially for people who do not receive benefits but share an account with someone who does. Some financial data will be special category data under UK GDPR, revealing political opinions, religious and philosophical beliefs, trade union memberships, health data and sexual orientation. The Information Commissioner drew attention to the likelihood of health data being processed under this power in particular.²³ In addition to an Article 6 legitimate interest, a special category condition under Article 9 must apply for the data to be lawfully processed. It is unclear which, if any, Article 9 interest could apply – given that the power does not in and of itself authorise breaches, it is unlikely to be Article 9(2)(b) (carrying out obligations under the law). The Information Commissioner advised that “government will need to consider how the relevant additional processing conditions required for such information in the UK GDPR will be met”.²⁴

12. The proposals could impact EU adequacy. Enacting a disproportionate and intrusive mass surveillance law would move the UK significantly away from existing data protection legislation, which is based upon EU regulations. As Lord Allan observed in relation to the EU adequacy decision:

“Bulk digital surveillance has been a point of particular concern from an EU-perspective – and bulk surveillance on a “suspicionless” basis is likely to raise significant questions.”²⁵

²² David Naylor and Michael Dowden, 'Government access to personal data in bank accounts: a compliance challenge for banks, and a threat to EU adequacy?' (17 January 2024):

<https://www.lexology.com/library/detail.aspx?g=3a4671d4-a37e-4785-80cc-36f8d3a13e75>

²³ Information Commissioner’s Further Response to the Data Protection and Digital Information (No. 2) Bill: (18 December 2023, p.5): <https://ico.org.uk/media/about-the-ico/consultation-responses/4027809/dpdi-commissioner-further-response-231218.pdf>

²⁴ Ibid.

²⁵ David Naylor and Michael Dowden, 'Government access to personal data in bank accounts: a compliance challenge for banks, and a threat to EU adequacy?' (17 January 2024):

<https://www.lexology.com/library/detail.aspx?g=3a4671d4-a37e-4785-80cc-36f8d3a13e75>

13. The power would create data security risks. Frequent searches and exchanges of masses of sensitive personal financial data within numerous third party organisations, and subsequent frequent transfers to the government, would incur security risks such as leaks, loss, theft and hacking. DWP's impact assessment says that it will ensure that data will be "transferred, received and stored safely".²⁶ Such a claim is dubious in light of the Department's track record of data security, considering that it was recently reprimanded by the ICO for data leaks so serious that they were reported to risk the lives of survivors of domestic abuse.²⁷ With no limitations set around the type of data DWP can access, the impact could be even more severe.

RISKS OF AUTOMATED DECISIONS AND 'HORIZON-STYLE' ERRORS

14. Thousands of decisions regarding the collection and reviewing of private financial information of people receiving benefits will be automated. This is a high-risk way to make decisions, particularly in sensitive cases. The Information Commissioner has warned that the power is highly likely to involve automated decision-making as:

"the risk remains that processing could eventually move into this territory, particularly given the limits of the measure in identifying relevant individuals with multiple accounts"²⁸

Big Brother Watch has previously expressed serious concern over disrespect for individuals' legal rights regarding automated decision-making - particularly in relation to how the Data Protection and Digital Information Bill stands to further weaken people's rights in this respect.²⁹ Regarding how people's data will be assessed, DWP has stated that "we are clear [...] that no automatic decisions will be made based on data alone".³⁰ Whilst that may be technically the case for decisions to suspend benefits, it is highly likely to be at least de facto the case in parts of the process that engage rights, such as decisions to intrude on financial privacy.

²⁶ Department for Work and Pensions, Third Party Data Gathering Impact Assessment (IA) (September 2023): https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf 8.

²⁷ Information Commissioner's Office, Letter to the DWP (31 October 2022): <https://ico.org.uk/media/action-weve-taken/reprimands/4023126/dwp-reprimand.pdf>

²⁸ Information Commissioner's view on the Data Protection and Digital Information Bill (DPDI Bill) – Lords Committee stage (March 2023): <https://ico.org.uk/about-the-ico/information-commissioner-s-response-to-the-data-protection-and-digital-information-bill/information-commissioner-s-view-on-the-dpdi-bill/>

²⁹ Big Brother Watch, Big Brother Watch Briefing on the Data Protection and Digital Information (No. 2) Bill for House of Commons Committee Stage (May 2023): <https://bigbrotherwatch.org.uk/wp-content/uploads/2023/05/Big-Brother-Watch-Briefing-on-theData-Protection-and-Digital-Information-2.0-Bill-for-House-of-Commons-Committee-Stage.pdf>

³⁰ Department for Work and Pensions, Third Party Data Gathering Impact Assessment (IA) (September 2023): https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf

- 15. There are no provisions for algorithmic transparency and accountability.** There is no information specifying who is responsible for supplying the algorithms required for this mass surveillance power. There are two options: either DWP will provide third party organisations with existing methods, or third parties will be responsible for developing and deploying their own. If the latter, third party organisations would be responsible for the expense associated with developing such systems. This could incur a financial and operational burden on banks and other affected third party organisations. In both cases, there are serious questions around algorithmic transparency and accountability.
- 16. With the constant scanning of tens of millions of accounts in relation to often complex claims, false positive matches for fraud or error are highly likely.** The scale of surveillance suggested by these powers is so vast that scanning for such 'indicators' will be automated. As a result, significant numbers of 'false positives' will lead to account-holders' personal details being wrongly flagged for further investigation to the government, which may incur further privacy intrusion and in some cases have more serious ramifications. When scanning 20+ million accounts, even a remarkably low error rate of 1% would lead to 200,000 people's accounts being wrongly flagged to DWP.
- 17. Financial institutions' 'Suspicious Activity Reports' already have a very high false hit rate.** The requirement upon banks and other third parties to monitor and report on the accounts of benefits claimants is somewhat reminiscent of a bank's use of "Suspicious Activity Reports" (SARs) to combat money laundering, etc. In 2017, a study found that a sample of the largest banks reviewed approximately 16 million alerts, filed over 640,000 SARs, and showed that only 4% of those SARs resulted in law enforcement involvement.³¹ Ultimately, this means that at least 90-95% of the individuals that banks reported on were innocent. The important difference between the NCA investigating financial crime, and DWP investigating suspected benefits fraud and error, is that the former are working to a criminal level of suspicion whereas DWP is not. Without that standard threshold, it is even more likely that this power will see an aggressive approach, resulting in a vast number of accounts being incorrectly flagged.
- 18. A related trial indicated that this extraordinary power is unlikely to be an effective measure.** DWP has trialled similar measures through Proof of

³¹ Bank Policy Institute, "The Truth About Suspicious Activity Reports" (22 September 2020): <https://bpi.com/the-truth-about-suspicious-activity-reports/>

Concept (PoC) trials.³² The government ran a small-scale PoC in 2017, in which a bank identified 549 accounts that received benefits payments and matched certain risk criteria (i.e., capital above benefits threshold), for review. The sample of cases were not randomly selected – instead, they were derived from suspicious activity reports (SARs). This means that the 'success' rate is significantly higher than what would be expected under these proposals.³³ Of this biased sample, half were deemed suitable for investigation, and subsequent action was needed to remedy either fraud or error in 62% of cases that were investigated. The government reported this as a success, but this means that fewer than 1 in 3 of the 549 SAR-flagged accounts were actionable.³⁴ This is a high rate of false positives, particularly in a context where being incorrectly flagged could have a serious impact on someone and even disrupt a person's ability to receive essential payments. This would disproportionately impact vulnerable individuals – for example, disabled people on direct payments who must have care accounts set up in their name to accept local funding, accounts which hold thousands of pounds. An automated system may wrongly and repeatedly identify these accounts as fraudulent, thereby putting disabled people at far higher risk of wrongful fraud investigation.³⁵ Such a high inaccuracy rate would also undermine the argument that the powers are a proportionate interference with individuals' Article 8 right to privacy.

19. Errors resulting from the proposed surveillance power are likely to have particularly serious negative consequences for welfare recipients. Wrongful benefits investigations can lead to burdensome documentation demands which, if not complied with accurately and in time, can lead to the suspension of benefits. In such cases, innocent and often vulnerable people may be unable to afford basic necessities such as food, medicine, or heating bills. Further, there are numerous documented cases, such as those identified in a BBC investigation, of vulnerable people dying following alleged negative actions by DWP including the wrongful suspension of benefits.³⁶ In a recent

32 Department for Work and Pensions, Third Party Data Gathering Impact Assessment (September 2023): https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf 13.

33 Department for Work and Pensions, Third Party Data Gathering Impact Assessment (IA) (September 2023): https://assets.publishing.service.gov.uk/media/6564bab01524e6000da10168/DWP_third_party_data_impact_assessment_november_2023.pdf 69.

34 Department for Work and Pensions, Fighting Fraud in the Welfare System (26 May 2022): <https://www.gov.uk/government/publications/fighting-fraud-in-the-welfare-system/fighting-fraud-in-the-welfare-system--2#fn:1>

35 John Pring, 'DWP's bank snooping laws "would create trap" for claimants with social care accounts' (22 February 2024): <https://www.disabilitynewsservice.com/dwps-bank-snooping-laws-would-create-trap-for-claimants-with-social-care-accounts/>

36 Deaths of people on benefits prompt inquiry call – Alex Homer, BBC News, 10 May 2021: <https://www.bbc.co.uk/news/uk-56819727>

example, DWP falsely accused a single mother of owing £12,000 when, in actual fact, DWP owed her money.³⁷

20. **The Government must learn lessons from the Horizon scandal.** Using algorithms in this high-risk context is uncomfortably reminiscent of the Horizon scandal, where hundreds of people were wrongfully prosecuted using data from faulty software - resulting in wrongful imprisonment, financial ruin, and suicide.³⁸ Indeed, the same legal standards that saw people wrongfully convicted in relation to Horizon still apply. Courts are currently required to presume that systems operate correctly, placing the onus upon defendants to provide evidence that the system they are implicated by is flawed.³⁹ However, unlike the Horizon scandal, the individuals affected worst by this bank spying will not be small business owners but people already suffering on the poverty line, people who are vulnerable, sick or disabled or who care for vulnerable, sick or disabled people, people with mental health problems, and elderly people among others. The risks are incredibly high.

21. **The Public Accounts Committee raised concerns about DWP's lack of algorithmic transparency.** In December 2023, the Public Accounts Committee noted that the DWP has not been clear as to what proportion of benefit claims have been subject to this algorithmic surveillance, nor has it published any assessment of the impact on customers.⁴⁰ Big Brother Watch shares the Committee's concerns about the lack of transparency surrounding these tools and the lack of consideration of claimants who may be vulnerable or from protected groups. DWP has not sufficiently addressed these problems.

EQUALITY IMPACT

22. **The Equality and Human Rights Commission (EHRC) has called on parliament to reject the powers entirely, as the privacy intrusion and risks of other consequential harms will have the greatest impact on those in receipt of benefits, many of whom are in receipt of benefits due to a protected characteristic such as disability or age.** Some of the poorest in our society, people with disabilities or long term illnesses, carers, or even elderly people relying on pensions will be subject to their private financial data being pre-

37 Isabella McRae, 'DWP falsely accuses single mum of owing £12,000 – when they actually owe her money' (16 January 2024): <https://www.bigissue.com/news/social-justice/dwp-benefits-universal-credit-money-owed-penny-davis/>

38 Kevin Peachey, Michael Race, and Vishala Sri-Pathma, 'Post Office scandal explained: What the Horizon saga is all about' (10 January 2023): <https://www.bbc.co.uk/news/business-56718036>

39 David Allen Green, "'Computer says guilty' – an introduction to the evidential presumption that computers are operating correctly' (30 September 2023): <https://davidallengreen.com/2023/09/computer-says-guilty-anintroduction-to-the-evidential-presumption-that-computers-are-operating-correctly/>

40 House of Commons Committee of Public Accounts, The Department for Work and Pensions Annual Report and Accounts 2022-2023 (6 December 2023): <https://committees.parliament.uk/publications/42434/documents/210942/default/>.

emptively intruded on by banks and other private companies they engage with, potentially examined by the government without their knowledge, and at risk of consequential harms as a result of that characteristic. The EHRC has expressed concerns of **'unnecessary and disproportionate checks on the bank accounts of benefit claimants, disproportionately impacting people with certain protected characteristics'**⁴¹ and warned of the **'significant risk that the intrusive nature of this proposal breaches Article 8 (right to privacy) and Article 14 (freedom from discrimination) of the ECHR'**.⁴²

23. When addressing the potential for disproportionate impact on such vulnerable communities during Committee stage in the House of Lords, Viscount Younger of Leckie stated:

“the DWP is confident that this proposal meets our obligations to eliminate discrimination, in that we have not identified any groups with protected characteristics that could be disproportionately impacted”⁴³

As Baroness Sherlock pointed out, it is in the very nature of social security that, when used to directly target claimants, this surveillance will engage people with protected characteristics.⁴⁴ Sickness and disability benefits engage disability; pensions engage age; benefits relating to children may engage age and also indirectly engage sex; and so on. However, more pressingly, this statement directly contradicts DWP's own statement in its Equality Analysis, retrieved via FOI. The document, while heavily redacted, specifically acknowledges the disproportionate impact on elderly people:

“The benefit population has an overrepresentation of those in the 70+ age band [...] older people may be more targeted by this policy as older individuals are likely to have more savings”⁴⁵

and on women:

“As women are more likely to be on benefits, therefore if fraud does reflect demographics of claimants they will be impacted disproportionately”⁴⁶

41 Equality and Human Rights Commission, 'Data Protection and Digital Information Bill House of Lords Committee Stage' (24 April 2024): <https://www.equalityhumanrights.com/our-work/advising-parliament-and-governments/data-protection-and-digital-information-bill-house-2>

42 Ibid

43 HL Deb 22 April 2024 vol. 837, col 490GC: <https://hansard.parliament.uk/lords/2024-04-22/debates/BOFACBA7-F69A-4D92-9C2A-6DA5FBCC8385/DataProtectionAndDigitalInformationBill>

44 HL Deb 22 April 2024 vol. 837, col 466GC: <https://hansard.parliament.uk/lords/2024-04-22/debates/BOFACBA7-F69A-4D92-9C2A-6DA5FBCC8385/DataProtectionAndDigitalInformationBill>

45 Equality Analysis: Third Party Data (TPD) Gathering measure, 29 August 2023, para 39 and para 40: <https://www.parkinsons.org.uk/sites/default/files/2024-05/Clean%20copy%20of%2020231130%20DWP%20Third%20Party%20Data%20EA%20v2%20%28redacted%29.pdf>

46 Ibid, para 42.

Not only have the government assessed the risk of discrimination, but these assessments have been both withheld and contradicted during the course of the Bill's scrutiny.

24. In addition to landlords, some banks and other third party organisations may choose not to accept individuals in receipt of benefits, or treat them less favourably. It is possible that third parties could make the decision not to accept customers on benefits, or to treat customers in receipt of benefits differently, to mitigate the potential costs and liabilities associated with processing their data for DWP or the financial penalty alternative.

25. DWP has not done enough to assess the risks of the proposed policy discriminating against protected groups. At the time of writing, the Government has yet to publish an unredacted Equality Impact Assessment addressing the potential impact of this unprecedented financial surveillance on people with protected characteristics, who may be disproportionately affected due to disability, age, sex and pregnancy/maternity. The National Audit Office (NAO) acknowledged that:

“When using machine learning to prioritise reviews there is an inherent risk that the algorithms are biased towards selecting claims for review from certain vulnerable people or groups with protected characteristics. This may be due to unforeseen bias in the input data or the design of the model itself.”⁴⁷

The NAO also stated that DWP “should be able to provide assurance that it is not unfairly treating any group of customers”. In response to the Public Accounts Committee’s report on benefits fraud and error in 2022, DWP committed to report annually to Parliament on the impact of data analytics on protected groups – however, ex post facto equality impact analysis may not satisfy the public sector equality duty, which must be fulfilled before and at the time when a policy is being considered.

Relatedly, the NAO reports that DWP performed a pre-launch ‘fairness’ analysis of its existing data analytics products currently in use to test for disproportionate impacts on people with the protected characteristics of age, gender and pregnancy. Reportedly, the results were largely “inconclusive” but did identify age bias towards older claimants. According to the Public Accounts Committee, DWP’s position is reportedly that “some level of

⁴⁷ DWP Annual Report and Accounts 2022-3, 6 July 2023, para. 5.10, p.309: <https://assets.publishing.service.gov.uk/media/64a576d47a4c230013bba1e7/annual-report-accounts-2022-23-web-ready.pdf>

algorithmic bias is to be expected because of how benefit payments work”.⁴⁸ This position does not necessarily conform with DWP’s legal obligations under the Equality Act, Human Rights Act and Data Protection Act.

The NAO also acknowledged that DWP is unable to test conclusively for potential discrimination due to limited demographic data about claimants.⁴⁹ The Public Accounts Committee concluded that “DWP has not done enough to understand the impact of machine learning on customers to provide them with confidence that it will not result in unfair treatment”.⁵⁰

IMPACT ON HOUSING CRISIS

26. **This power could decimate the private rental market for recipients of benefits.** Already, there are well-documented issues with recipients of benefits being accepted as tenants by private landlords and benefits recipients are at risk of unlawful discrimination in the rental market.⁵¹ A recent government survey found that 1 in 10 private renters – around 109,000 households – said they had been refused a tenancy in the past 12 months alone because they received benefits.⁵² This is a precarious situation: due to the housing crisis, many people in receipt of benefits must rent from private landlords in order to secure housing. The unintended consequence of the rushed financial surveillance powers in this Bill will add a major new deterrent to landlords receiving rent via tenants’ housing benefit, as they will be subjected to financial surveillance across not only that bank account but all their personal financial accounts, as per the Bill. The Minister confirmed that landlords would be impacted during Committee Stage of the Bill in the House of Lords and admitted that the powers would even extend to charity and joint accounts where landlords in receipt of tenants’ housing benefit are named on such accounts.⁵³ Affected landlords will also be at heightened risk of DWP errors and wrongful investigations arising from the surveillance. Such an intrusive regime could decimate the private rental market for recipients of benefits by making them less desirable tenants and significantly exacerbate the housing crisis for Britain’s most vulnerable people.

48 Committee of Public Accounts, The Department for Work and Pensions Annual Report and Accounts 2022-2023 (6 December 2023), p.18: <https://committees.parliament.uk/publications/42434/documents/210942/default/>

49 DWP Annual Report and Accounts 2022-3, 6 July 2023, para. 5.12, p.309: <https://assets.publishing.service.gov.uk/media/64a576d47a4c230013bba1e7/annual-report-accounts-2022-23-web-ready.pdf>

50 Committee of Public Accounts, The Department for Work and Pensions Annual Report and Accounts 2022-2023 (6 December 2023): <https://committees.parliament.uk/publications/42434/documents/210942/default/> 7.

51 Can private landlords refuse to let to benefit claimants and people with children? - House of Commons Library, October 2023: <https://researchbriefings.files.parliament.uk/documents/SN07008/SN07008.pdf>

52 English Housing Survey 2021 to 2022: private rented sector – DLUHC, July 2023: <https://www.gov.uk/government/statistics/english-housing-survey-2021-to-2022-private-rented-sector/english-housing-survey-2021-to-2022-private-rented-sector>

53 HL Deb 22 April 2024 vol. 837, col 484. GC: <https://hansard.parliament.uk/lords/2024-04-22/debates/BOFACBA7-F69A-4D92-9C2A-6DA5FBCC8385/DataProtectionAndDigitalInformationBill>

COMPLIANCE CHALLENGES FOR AFFECTED THIRD PARTY ORGANISATIONS

27. **Third parties face fines for failures to comply.** The proposals allow for third parties who do not comply with account notice requests to be levied with financial penalties if the Secretary of State considers that the person who has been given an AIN has failed to comply with it.
28. **The proposed power will create a significant resource burden for affected third parties.** To perform the required mass surveillance and prevent inadvertent disclosure of personal data from customers with similar names or frequently changing addresses, banks must conduct thorough data matching exercises and checks. Banks, financial service providers and other affected third parties will therefore face heightened financial and resource demands due to these requirements.⁵⁴ This burden has been recognised by the financial sector. According to the Director of Economic Crime Policy and Strategy at UK Finance, which represents over 300 firms across the banking and finance industry, the proposal would present “quite a strong draw on resources [...] that we think would be better placed on serious fraud and organised criminal gangs.”⁵⁵
29. **Smaller third party organisations may face significant compliance challenges.** The power to issue an AIN is not limited to a specific institution, which means banks are not the only third party that can receive such a notice. Small businesses, such as a small online platform that facilitates peer-to-peer transactions and may have minimal capacity to respond to such requests, could be levied with heavy fines of a £1,000 fixed penalty and £40 daily penalties, which can rise to £1,000 daily rate after review. Incurring penalties would be a public matter and would risk reputational damage.⁵⁶

AN ABUSE OF THE PARLIAMENTARY PROCESS

30. **This rushed power has had inadequate scrutiny as it was introduced at Report Stage in the House of Commons – almost 9 months after the DPDI Bill was introduced.** Many parliamentarians, and recently the Constitution Committee, have raised concerns about the late addition and limited debate time for these “far-reaching” powers.⁵⁷ Given the serious impact of such

54 David Naylor and Michael Dowden, 'Government access to personal data in bank accounts: a compliance challenge for banks, and a threat to EU adequacy?' (17 January 2024):

<https://www.lexology.com/library/detail.aspx?g=3a4671d4-a37e-4785-80cc-36f8d3a13e75>

55 Eleanor Myers, 'Don't turn us into social security cops, banks tell UK government' (12 March 2024):

<https://www.politico.eu/article/rishi-sunak-social-security-cops-uk-government/>

56 David Naylor and Michael Dowden, 'Government access to personal data in bank accounts: a compliance challenge for banks, and a threat to EU adequacy?' (17 January 2024):

<https://www.lexology.com/library/detail.aspx?g=3a4671d4-a37e-4785-80cc-36f8d3a13e75>

57 Data Protection and Digital Information Bill – Select Committee on the Constitution, 2nd Report of Session 2023-4, 25 January 2024, paras 15-17:

expansive surveillance powers on fundamental rights and freedoms, it is entirely inappropriate that this amendment was tabled at such a late stage of the Bill alongside 239 others, as it did not allow for adequate democratic scrutiny or parliamentary debate - as Lord Bassam of Brighton said during Second Reading (HL), it is an “affront to our parliamentary system”.⁵⁸ Sir Stephen Timms MP also raised concerns about the late stage at which such significant powers were introduced during Report Stage (HC):

“It is surprising that the Conservative Party is bringing forward such a major expansion of state powers to pry into the affairs of private citizens, and particularly doing so in such a way that we are not able to scrutinise what it is planning [...] The proposal in the Bill is for surveillance where there is absolutely no suspicion at all, which is a substantial expansion the state’s power to intrude.”⁵⁹

CODE OF PRACTICE

31. **The Government cannot offer Parliament or the public reassurance by deferring vital legal protections in favour of guidance in a possible future code of practice.** Schedule 11, Part 2 states that the Secretary of State ‘may’ issue a code of practice – it is not a requirement. Nevertheless, we understand that DWP views many of the legislative gaps and serious challenges associated with this power as issues that can be addressed by a code of practice to be drafted after the enactment of the Bill. Whilst useful for providing guidelines to those using and affected by the powers, a code of practice is not enforceable and a failure to act in accordance with any future code does not make an individual liable to legal proceedings (paragraph 8).

COMMITTEE STAGE HOUSE OF LORDS

32. The extraordinary scope of these powers was widely criticised by Peers from across the house. Indeed, the Minister himself acknowledged the far-reaching nature of the measures, saying:

“[t]here may be some people who are not themselves benefit claimants but who have given a person permission to pay benefits into their bank account, who may be picked up in the data returned by third parties”.⁶⁰

58 <https://committees.parliament.uk/publications/43076/documents/214262/default/>
HL Deb 19 December 2023 vol. 834, col. 2210: <https://hansard.parliament.uk/lords/2023-12-19/debates/2960AC9B-D86E-4EA1-8E4E-F3198BEE702F/DataProtectionAndDigitalInformationBill>

59 HC Deb 29 November 2023 vol. 741 cc899-900: <https://hansard.parliament.uk/commons/2023-11-29/debates/46EF0AA6-C729-4751-A3DA-6A3683EB8B87/DataProtectionAndDigitalInformationBill>

60 HL Deb 22 April 2024 vol. 837, col 483GC: <https://hansard.parliament.uk/lords/2024-04-22/debates/B0FACBA7-F69A-4D92-9C2A-6DA5FBCC8385/DataProtectionAndDigitalInformationBill>

33. Baroness Kidron, Lord Anderson, Baroness Chakrabarti, Lord Clement-Jones and Lord Kamall gave notice of their opposition to the question that the powers stand part of the Bill at Committee Stage. They were joined by peers from across the house, including Baroness Sherlock, Baroness Lister, Lord Vaux, Lord Sikka and Lord Davies of Brixton, in expressing deep concerns over the unnecessary and disproportionate nature of these powers and the detrimental impact on people's privacy.

34. During the debate, the Minister Viscount Younger claimed that 'there are appropriate safeguards in place for this data-gathering power, which will be included in the code of practice'.⁶¹ However, the drafting of the Bill is staggeringly broad, and the necessary safeguards are not present on the face of the Bill. Lord Vaux highlighted this:

"We have been talking about limited information, a limited nature and the limited things that we will look at, **but that is not what the Bill says.** [...] there seems to be a huge gap."⁶²

35. Peers emphasised the chasm of uncertainty created by the contrast between Government claims on how this power would work and the actual drafting of the Bill. Lord Clement-Jones addressed these contradictions:

"We have 'test and learn', 'filtering' – which sounds extraordinary – and 'signals' but none seem to be in the black letter of the schedule, nor in the rest of the Bill. **We have a set of intentions and we are meant to trust what the DWP is doing with these powers.** Does the Minister not recognise that the Committee is clearly concerned about this?"⁶³

Even in the instance that a code of practice is issued, it would be entirely inappropriate to relegate safeguards for such an expansive, intrusive power to non-binding guidance. Any amendment introducing a mandatory Code of Practice would still not offer sufficient protection from the harm and rights impact threatened by such financial and welfare surveillance.

We urge peers to oppose the Question that clause 128 and Schedule 11 stand part of the Bill.

61 HL Deb 22 April 2024 vol. 837, col 471GC: <https://hansard.parliament.uk/lords/2024-04-22/debates/BOFACBA7-F69A-4D92-9C2A-6DA5FBCC8385/DataProtectionAndDigitalInformationBill>

62 HL Deb 22 April 2024 vol. 837, col 486GC: <https://hansard.parliament.uk/lords/2024-04-22/debates/BOFACBA7-F69A-4D92-9C2A-6DA5FBCC8385/DataProtectionAndDigitalInformationBill>

63 HL Deb 22 April 2024 vol. 837, col 485GC: <https://hansard.parliament.uk/lords/2024-04-22/debates/BOFACBA7-F69A-4D92-9C2A-6DA5FBCC8385/DataProtectionAndDigitalInformationBill>