NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Social Security Fraud Bill

Response by the Northern Ireland Human Rights Commission

October 2001

The Northern Ireland Human Rights Commission is a statutory body established on 1 March 1999 as a result of the Belfast Agreement of 10 April 1998. The activities of the Commission include reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to human rights; advising on the compatibility of legislation and policy with human rights, and promoting understanding and awareness of human rights. It also assists individuals in legal proceedings where human rights issues arise, brings proceedings involving law or practice concerning the protection of human rights, and conducts research and investigations. Recently the Commission has been developing and consulting on proposals for a Bill of Rights for Northern Ireland.

An important part of the Commission's work, under section 69(4) of the Northern Ireland Act 1998, is to advise the Assembly whether any Bill is compatible with human rights.

The Social Security Fraud Bill

The Commission regrets that, due to extreme pressure on its resources, it has been unable to provide a full and timely analysis of the compatibility of the Social Security Fraud Bill with the Convention rights entrenched in the Human Rights Act 1998 ("the HRA"), and with other human rights standards. The following comments are provided to Assembly members at this late stage in the Bill's progress to help inform the debate on the Bill itself, and the Code of Practice that is to follow.[1] The Commission may wish to make separate representations when that Code is issued for consultation, but it is likely that the issues raised by the Code will be substantially the same as those discussed below.

The Bill authorises some social security and Housing Executive officers to obtain and share

[1] The Code is available in draft form in the Assembly library.

information held by banks, utilities and certain other organisations, so that they can cross-check it with information provided by benefit claimants. It also prescribes certain penalties for benefit fraud (affecting offenders, their families and their employers), and clarifies the offence of failing to notify a change of circumstances.

The Assembly Bill is substantially based on legislation enacted at Westminster in the Social Security Fraud Act 2001 (c.11). It is important to note that any changes to the Bill, or non-enactment of it, would break with the convention of parity with Great Britain in social security matters. This would not contravene section 87 of the Northern Ireland Act, which encourages but does not mandate parity. The Human Rights Commission nevertheless recognises that the convention of parity is a strong one, from which the Assembly may be reluctant to depart.

The Commission's assessment

In considering the Bill, the Commission has looked at how the letter of the law could impact on civil liberties in a "worst case" scenario—that is, if the full powers conferred by the Bill were used gratuitously, with no particular concern for proportionality or necessity. It readily acknowledges that how the legislation is used in practice is likely to be considerably affected by commitments made by the Minister, in the Assembly debates or elsewhere, along with the terms of the proposed Code of Practice and the diligence and self-restraint of the senior officials empowered under the legislation. (Nothing that is said below about the ways in which officials *could* misuse their powers should be taken as a reflection on the integrity and fairness of any of the present staff of the Benefits Investigation Service, the Social Security Agency, the Housing Executive or Department for Social Development.) We are nevertheless obliged to point out that elements of the Bill could be open to abuse in ways that legislators might not have anticipated, and we believe that it is preferable to address these concerns before enactment. The Assembly may consider that further assurances from the Minister as to the ways in which the powers will be exercised will allay the concerns that we detail below. Alternatively, it may wish to address some of the issues through the consultation on the proposed Code of Practice.

This response concentrates on the privacy issues arising from the first two sections of the Bill (the information provisions), with particular reference to Article 8 of the European Convention on Human Rights (on respect for private and family life). In view of the developing jurisprudence on proportionality, special attention has been paid to the question of whether the powers granted in the legislation are such as are genuinely necessary in a democratic society to secure the legitimate objective of combating benefit fraud.

The Commission has not identified any obvious difficulties with section 3, concerning the Code of Practice, section 4 (providing for payment for information gathered under ss.1 and 2), or the later sections concerning loss of benefit for a convicted offender (s.6), penalties for colluding employers (s.14) or failure to notify a change in circumstances (s.15). As regards the effect of benefit offences on members of the offender's family, and the offender's partner in the case of a joint claim (ss.7 and 8), there may be a potential conflict with Article 1 of Protocol 1 to the Convention, which recognises a general right to peaceful

enjoyment of one's possessions.[2] However it is the privacy issues that require closest scrutiny.

At this point it may be worth stating that the Commission has no objection whatever to the policy aim, in that it recognises the theft of public money as an infringement of the rights of all citizens; its only concern is that measures taken to combat this abuse must not of themselves constitute a greater abuse. Any infringement on human rights must be proportional to the policy aim.

The Memorandum accompanying the Bill states that the information provisions in section 1 "will" generate savings of £4.5-£9m per year,[3] a startling assertion given that the current level of fraud is estimated by the Department for Social Development as about £73m per year.[4] Obviously, if the measures in the Bill could be shown to have so dramatic an impact on the cost to society of benefit fraud, they would be easier to justify in proportionality terms than if there were little or no saving.[5] It follows that there should be reliable ways of estimating the savings produced by the measure, and this is a matter which could be addressed in the proposed Code of Practice, and which should be kept under review by the Department and indeed the Assembly.

It should be noted, however, that there is no official estimate of the amount saved by the *current* fraud prevention and detection activity of the Benefits Investigation Service in Northern Ireland. The £4.5-£9m estimate for additional savings is an extrapolation from an estimate prepared for the Westminster legislation, and the Department seems to have inserted this figure into the Memorandum without doing any separate calculation for Northern Ireland. Given that very few senior staff (perhaps fewer than ten) will be authorised under s.1, it should be relatively easy to assess the savings that their new powers generate.

Privacy, reasonableness, proportionality and presumption of innocence: the issues in sections 1 and 2

Section 1 of the Bill substantially amends the Social Security Administration (Northern Ireland) Act 1992 (c.8) ("the Administration Act"). The amendments allow authorised officers of the Department for Social Development or the Housing Executive[6] to seek information from 12 categories of organisation (principally in the banking, finance and insurance, utility and education sectors), or from anyone working for such organisations.[7]

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[2] European caselaw recognises that a benefit entitlement can be a "possession". If one person's possession is interfered with to punish another's wrongdoing, there is arguably a violation of the Article, but this is not a clear-cut issue.

[3] *Social Security Fraud Bill Explanatory and Financial Memorandum*, paragraphs 10 and 13.

[4] *Official Report*, 11:8, 26 June 2001, page 272, cited in the Assembly Committee's *Report on the Social Security Fraud Bill*.

[5] We are not saying that fraud prevention is not worthwhile unless it saves huge amounts of money: all theft of public funds is wrong. The point here is that a very large saving to the public purse might justify interference with individual rights to a greater extent than a very small saving would.

[6] It is our understanding that, at present, the Department alone conducts fraud investigations, and that the Bill's coverage of the Housing Executive is there in case a future decision should make it responsible for investigating housing benefit fraud.

[7] S.1(2), at (2A). The Bill covers banks, credit providers (which would include building societies, credit unions, leasing and loan companies, pawnbrokers and many others whose sole or main business is lending), insurance companies, credit reference agencies, bodies that facilitate the exchange of information for

The organisations affected are to be specified (and may be changed) by order.[8] In most cases the information must relate to a particular person, identified by name or description,[9] who is reasonably suspected of benefit fraud, or to a member of his/her family.[10] However, even without identifying the individual concerned, an authorised officer from a government department (but not the Housing Executive) can demand details of electricity or gas supplied to a specified address,[11] or can require a telecommunications provider to disclose the name and address of the person identified by a particular telephone number or e-mail address.[12] It will be an offence to obstruct an authorised officer from obtaining the information, with fines up to £1,000, followed by £40 a day for each further day's non-compliance.[13]

The aspect of section 1 that should cause most concern is that the actual wording of the Bill imposes very few limits on the type of information that can be demanded. No-one can be required to provide information that would incriminate himself/herself or his/her spouse, nor any material covered by legal professional privilege.[14] Telecommunications providers cannot be required to disclose the actual content of telephone calls or e-mails, or "traffic data" (details of incoming and outgoing calls).

In essence, an authorised officer can obtain access to everything else that a utility company, bank, credit reference agency, telephone company or other relevant organisation has on written or computerised records about the affected individual, whether or not the material could reasonably be thought to have any bearing on whether the person or a member of their family could have committed a benefit fraud. The Bill, read with the existing s.103A(2) of the Administration Act, indicates that the powers are to be used for certain purposes, mainly for establishing whether a benefit is or was payable, checking whether legislation was complied with, and preventing, detecting and securing evidence of fraud (and, in the case of some social security benefits, investigating the circumstances of accidents, injuries or diseases giving rise to claims). However, this does not actually restrict the sorts of information that the officials might access.

- In relation to financial institutions, that access could include details of every transaction, including cheques, standing orders, direct debits, overdrafts, credit scores, savings and borrowings, credit card expenditure, payment and default records, and other details of the customer's relationship with the company.
- In relation to insurance, the records to which officers could demand access would include applications containing large amounts of personal information, policies, claims, reports on health, injuries and disabilities, and other records and correspondence.
- In relation to the education sector, the data made accessible would include enrolment and attendance details, academic record, grades, qualifications, grant and loan applications, and so on.

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preventing or detecting fraud, money transfer services, gas, electricity and telecommunications companies, educational establishments, bodies involved in managing educational admissions or student grants or loans, and any servant or agent of any of the above.

[8] S.1(4), at (6).
[9] S.1(2), at (2B).
[10] S.1(2), at (2C).
[11] S.1(2), at (2D), and s.1(5).
[12] S.1(2), at (2F).
[13] S.1(6).
[14] S.1(3).

- In relation to telecommunications providers, the authorised officers can access billing information including the time and duration (but not source or destination) of calls, the customer's payment records, and any other information about the customer that is held or obtained by the provider. That could include information provided in confidence (or with a reasonable expectation of confidence) by the customer, for example in correspondence with the company or in response to surveys, about matters that could have no bearing on benefit entitlement. It would certainly include information that the customer provided for a specific purpose and on the understanding that it was to be held and used only for that purpose.

It may be that the Code of Practice would specify that certain types of information would not be sought. It may also be that the authorised officers would seek access to everything that they were empowered to see; but the Bill as introduced imposes almost no limits, and the Code can be amended at the Government's convenience. The Bill certainly gives powers to access many categories of data that have no possible relevance to benefit entitlement. The Assembly has to consider whether this is strictly necessary, in a democratic society, to achieve the stated purpose of the Bill.

In addition to the power to force disclosure of information on a case-by-case basis, section 2 of the Bill would allow both the Department and the Housing Executive to make standing arrangements for access to electronic records held by the specified organisations where it seemed likely that, "from time to time", these records would contain relevant information.[15] The human rights issues around electronic access are not very different, except that in practice, the efficiency and lower cost of electronic access (a matter noted by the Committee for Social Development)[16] could have the effect of encouraging more use of the powers than would otherwise be the case. It would at least be desirable that the Code of Practice should make it clear that the powers should not be used any more readily through the standing arrangements than they would be through case-by-case requests.

The only requirement that has to be satisfied before an authorised officer makes any demand for access, or trawls through records to which standing access has been obtained, is that the authorised officer should have "reasonable grounds for believing" that the information sought relates to "a person who has committed, is committing or intends to commit a benefit offence", or to a family member of such a person.[17] The information does not have to relate to the alleged offence, only to the alleged offender or his or her family member.

There is nothing in the Bill to indicate what constitutes "reasonable grounds". Evidence to the Committee for Social Development made it clear that this could be something as slight as an anonymous tip-off,[18] conceivably based on malice.[19] The Committee, in its consideration of the Bill, expressed concern on this point and was unable to secure a

[15] S.2(1), relating to the Department, and s.2(2), relating to the Housing Executive.
[16] Committee for Social Development, *Report on the Social Security Fraud Bill*, paragraph 24.
[17] S.1(2), at (2C).
[18] Committee *Minutes of Evidence*, paras. 42-43.
[19] The Department undertook that malice would be "taken into account" in evaluating anonymous allegations—Committee *Report*, Appendix 3, answer to Q12. The Code may clarify how this is to be done, but in view of the fact that fewer than 3 per cent of referrals result in prosecution, there should perhaps be an assumption that any anonymous allegation is very likely to be unfounded.

definition of "reasonable grounds" from officials; it consequently recommended that the Assembly should seek assurances from the Minister.[20]

The courts are accustomed to testing reasonableness and it might be suggested that the availability of judicial review consequently offers a sufficient safeguard. Of course it is best to ensure, as far as possible, that policies and practices are reasonable before they have to be tested in court. Clear guidance in the Code of Practice could help to avoid litigation.

The Commission shares the Committee's view that "rigorous management checks" would be a useful means of encouraging officers to observe adequate standards of reasonableness. It welcomes the assurance from the Department that investigations will be subject to management checks and audit trails,[21] but the assurance did not stipulate that any such checks need be made *before* or *during* an investigation of someone's accounts; they could therefore be limited to periodic reviews of past investigations. The Code of Practice should provide for management checks of the investigation decisions, or a proportion of them, prior to records being accessed.

On last year's statistics, over 21,000 tip-offs and other referrals were received and 13,000 investigations were carried out into suspected benefit fraud, so it can be assumed that the Bill would lay open to investigation the financial and educational records of a similar number of claimants each year, along with their family members. It is notable that, last year, only 465 of these investigations resulted in prosecution, and 49 in administrative penalties,[22] so that the vast majority of people investigated turned out either to be innocent, or not to have committed an offence of sufficient gravity even to warrant an administrative penalty.[23] These statistics should be borne in mind in considering the value of the power to intrude on privacy in relation to the extra evidence that it might produce of benefit fraud. In order to generate extra savings of £9m per year, even if the measures gave rise to twice as many prosecutions as last year, each new case would need to save about £20,000 on average.

There is nothing in the Bill to indicate how it can be established that someone "intends to commit" an offence. Almost all of the records to which the Bill would give access are historical: they show what the claimant or family member has been doing, not what they intend to do. Forming the view that there is an intent to offend could involve the officer guessing that because X is related to Y, a convicted fraudster, X is more likely to offend. This could give some scope for unfair or discriminatory treatment of particular classes of people. The Human Rights Commission notes the Committee for Social Development's view that in respect of "intention" the powers should be exercised only in cases of "suspected organised attempts at major fraud".[24] That would be preferable to a routine use, but it may still be open to unfair application.

At any rate, depriving someone of a right on the basis of a belief that they "intend" to commit an offence may contravene the presumption of innocence enshrined in Article 6 of

[20] Committee *Report*, para. 22.
[21] Committee *Minutes*, para. 68.
[22] The 465 include referrals to the Director of Public Prosecutions (in 28 cases). From the Committee *Report*, Appendix 3, answer to Q19.
[23] Almost a third of the other referred cases resulted in changes to entitlement, whether upwards or downwards, but we are concerned here only with serious benefit fraud.
[24] Committee *Report*, para. 23.

the European Convention. It was made clear in the Department's evidence that anyone thought to have previously committed a fraud would be considered more likely to offend,[25] although it was left unclear whether this would on its own constitute "reasonable grounds" of suspicion, or, indeed, whether any conviction or admission was required. In later evidence it was suggested that a tip-off about someone *who had a conviction* would constitute sufficient "reason to suspect".[26]

This is not too far removed from the notion, dropped from the original Westminster Bill, that it was legitimate to target certain classes of people as being more likely to commit fraud. The Northern Ireland Department repeatedly told the Committee for Social Development that the "reasonable grounds" for investigation would vary from case to case,[27] and it specified how it intended to ensure consistency in relation to prosecution and administrative penalties,[28] but not in relation to decisions to investigate. This appears to leave room for investigation decisions to be taken inconsistently and even arbitrarily, with potential for unfair discrimination—for example by officials deciding to investigate members of one part of the community more frequently than members of another. The Commission does not suggest that this is a likely outcome, nor that it lacks faith in the ability of Departmental officers to use their discretion fairly. We welcome the Minister's assurance that "obviously these powers would not be used on grounds such as community background, race or sex",[29] but it will not be obvious that the powers are being used even-handedly unless there is close oversight. As a matter of principle the Department should be asked to strive for consistency in defining "reasonable grounds", possibly by including criteria and examples of good and bad practice in the Code of Practice. There should be monitoring, ideally on section 75 lines, of the referrals made by investigators to authorised officers, and of the decisions to investigate taken by those officers.[30]

A particular risk with these extensive powers is that, rather than being *triggered* by a reasonable suspicion, they could be used to trawl for evidence to *establish* reasonable suspicion. Our concerns in this regard were not assuaged by the Department's response to a Committee member's question about whether a tip-off constituted "reasonable grounds": "You would examine whether someone were saying they were not working and look for evidence from bank accounts of regular payments coming in each month."[31] Thus the tip-off, followed by the claimant's denial of fraud, appears to justify an investigation of several months' bank statements.

In fact the Department acknowledged that "In many cases, when the bank account is examined, nothing will happen, because there is an innocent explanation for the perceived discrepancy".[32] Thus the Department anticipates that in "many cases" it will obtain access to a person's bank account, find a "perceived discrepancy" and require, and obtain, an "innocent explanation". This suggests that the possibility of there being an innocent explanation will not, in fact, deflect the official from examining an account, and thus that

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[25] Committee *Minutes of Evidence*, para. 15.
[26] Committee *Minutes*, para.79.
[27] Committee *Report*, Appendix 3, answer to Q4, and *Minutes* passim.
[28] Committee *Report*, Appendix 3, answer to Q5.
[29] Second Stage debate, 26 June 2001.
[30] The reference is to section 75 of the Northern Ireland Act 1998, i.e. monitoring to take account (so far as is practicable) of sex, disability, religious belief, political opinion, racial group, age, dependents, marital status and sexual orientation.
[31] Committee *Minutes*, paras.76-77.
[32] Committee *Minutes*, para. 28.

the "reasonable" suspicion amounts to a presumption of guilt. The Commission is not persuaded otherwise by the Department's evidence to the Committee; it was said that officers "will have to consider… whether the circumstances suggest that there is an innocent explanation as opposed to fraud",[33] but not that the presumption would be in favour of the possible innocent explanation, nor that such an innocent explanation would result in the powers not being used.

We note from the Department's evidence[34] that the authorised officer should not be the same person as the principal investigator of the alleged fraud (a point not included in the Bill itself, but that should at least be in the Code). The Bill requires the authorised officer to satisfy himself/herself that there is a reasonable suspicion. The courts might not recognise as "reasonable grounds" for an authorised officer to suspect fraud the mere fact of having been told of the suspicions of the principal investigator, especially if that person was junior to him/her. The authorised officer would have to assess *personally* the available evidence, including (and presuming in favour of) the possibility of an innocent explanation. It is arguable that a benefit fraud conviction could be unsound if it were shown to result from an investigative process based on a presumption of guilt, or that the evidence was acquired by an authorised officer who had not properly formed a reasonable suspicion.

Let us assume that, on the evidence obtained in non-intrusive ways, the authorised officer genuinely concludes that he/she has "reasonable grounds" for suspecting fraud. There is no requirement in the Bill for the authorised officer to confirm that his or her suspicion of actual or intended fraud is regarded as "reasonable" by another of the same rank or a superior officer, much less by any independent judicial or administrative authority. A very minimal additional safeguard, which could be included in the Code, would be to require the authorised officer to seek the agreement of a colleague or superior that the suspicion was reasonable.

We note that the Department expects authorised officers to exercise due diligence in arriving at their decision on "reasonable grounds", and moreover, that they are expected to ask themselves whether it was possible to obtain the information "in a less intrusive manner".[35] Indeed, the Department has asserted that the new powers would "only be used as a last resort when the information cannot be obtained by less intrusive means",[36] although it was not made clear that less intrusive means would actually have to be *tried*; rather, they have to be "considered and ruled out".[37] We would have preferred the Bill to contain an explicit duty always to consider, and where possible to attempt, less intrusive means of securing information, since that could help to ensure proportionality. This point could be addressed in the Code of Practice.

Another, related, point that the Code could address is the possibility of securing the information voluntarily from the claimant. The Department's assumption is that "it is likely that those with intent to defraud will decline consent",[38] but this could equate to an assumption that such a refusal adds to "reasonable grounds of suspicion". The Code will apparently ensure that "provision of the information by the claimant has been considered

[33] Committee *Minutes*, para. 15.
[34] Committee *Minutes*, paras. 29 and 58.
[35] Committee *Minutes*, para. 65.
[36] Committee *Report*, Appendix 3, answer to Q9.
[37] Answer to Q11.
[38] Committee *Report*, Appendix 3, answer to Q9.

and ruled out",[39] but it is not clear that this consideration actually entails asking the question. There is something of the ducking-stool mentality here. On the one hand, if the claimant declines to offer full access to his or her private financial records, perhaps on the grounds that this is regarded as an intrusion on privacy or because he/she objects to having to prove innocence, this refusal can itself be interpreted as justifying the intrusion. On the other hand, since a guilty person would be "likely" to refuse access, the authorised officer can "consider and rule out" asking for access and go ahead without asking. Either way, it seems likely that once the authorised officer is inclined to access the records, nothing will persuade him/her that it is unnecessary. The Code should make it clear that refusal of access does not indicate guilt nor add to grounds for suspicion, and that unless there are very good reasons to believe that it will prejudice the investigation, voluntary access should be sought before consideration is given to other means.

Since no warrant or other judicial authorisation has to be sought before the information is demanded (unlike in, for example, tax investigations), the courts will have no opportunity to test the reasonableness and necessity of any intrusion into privacy except by way of judicial review. At that stage, of course, the damage will have been done. After the event, there is no requirement to disclose to the affected person that information about her or him has been sought or obtained or shared or used, even if no fraud is found (except where there has been a formal Data Protection Act application); there are no controls over the retention, use or disclosure to third parties of information gathered, other than duties that the officer may have under other legislation or the common law.[40]

While the Bill states that officers "shall not seek to obtain" information about people other than the targeted individual, or information that falls outside the terms of the authority,[41] there are no safeguards in the Bill capable of preventing them accessing such information, and nothing to say what they should do with such information once they have it. The Committee urged the Department to "ensure that the information it obtains is only [that which] it requires for the purposes of investigating any particular case",[42] but it is quite certain that any investigation of the kind authorised by this Bill will give authorised officers access to huge amounts of extraneous information. For every item of data that might go towards proving a fraud by anyone, or towards the much more difficult task of proving an intent to defraud, the officer will necessarily gain knowledge of great numbers of everyday, lawful transactions that have nothing to do with social security or housing benefit. It is not reasonable to expect officers only to notice and record matters relevant to the uses that they are supposed to make of the information. They cannot help noticing information that is really private, personal and irrelevant to the purposes of the Bill.

The Assembly may be satisfied with the assurance given in the Department's evidence to the Committee that information gathered using the new powers to investigate a specific alleged fraud "can only be used for that purpose and cannot be disseminated elsewhere

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[39] Answer to Q11.

[40] S.117 of the Administration Act makes disclosure "without lawful authority" an offence, but it is a defence to show that the person believed that such disclosure was lawful. A difficulty with this Bill is that the vast scope that it creates for trawling expeditions into personal data could seriously disinhibit officers from disclosing elements of the data. It could create a culture in which information about individuals, being so easily obtained, is neither valued nor protected. At any rate it is foreseeable that, once it is established that public authorities can easily access what were previously regarded as protected areas, the civil liberties discourse will shift in the direction of an assumption that the strong, well-informed state knows best.

[41] S.2(1), at 103BA(2).

[42] Committee *Report*, para. 26.

throughout the agency".[43] However, it would surely be preferable that this should be expressed in the Bill itself, or in an assurance given to the Assembly by the Minister.

Most of the information held by the financial institutions, educational bodies, utilities and others covered by the new powers is information that their customers or clients would reasonably expect to be treated as private. The proposed power of state agencies to rummage through that information, on nothing stronger than the "reasonable" suspicion of the very person who has the power of access, unquestionably interferes with the right to privacy. The principal issue, then, is whether the interference is reasonable in terms of the United Kingdom's obligations under domestic and international human rights law, and that judgement has to include the test of proportionality.

The privacy right is defined in Article 8 of the European Convention (and reiterated in the Human Rights Act 1998), along with its limitation clause, as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Under the European Convention exceptions, the detection, prevention and punishment of benefit fraud are valid public interests, in that fraud is a crime, it affects the economic well-being of the country, and the strain that it places on the public purse could impact on the rights of others to access benefits. The Bill has other valid aims, such as to ensure that benefits are paid in accordance with the relevant legislation, and that people who collude with benefit fraud are penalised. The Bill thus satisfies several of the tests in Article 8(2).

The Article 8(2) phrase "in accordance with the law" is also satisfied in two of the three essential ways, in that the Bill is clear enough in the way that it authorises the interference with rights, and the text of the law itself is readily accessible. The third test[44] is that the law must be formulated with sufficient precision as to make it clear when and how it would be used. When the state takes upon itself a considerable discretion as to the extent to which it can pry into the affairs of citizens, the relevant law must show clearly "the scope and manner of exercise of the relevant discretion".[45] The Bill as introduced gives vast discretion to individual officers, but it does not indicate how they ought to use their powers in ways that comply with tests such as reasonableness and proportionality. It is unsatisfactory to say that this may be taken as read, in that the Human Rights Act imposes such obligations; it is preferable by far that a law conferring on state officials new powers over individuals should contain *explicit* statements on when and how the powers may be used.

We suggest that in relation to the "scope and manner of exercise" of discretion, there are serious problems arising from the absence of any stipulation in the Bill as to the types of information that can be sought, the level of evidence needed to justify a suspicion of fraud,

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[43] Committee *Minutes*, para. 58.
[44] From *Malone* v *United Kingdom* (1984) 7 EHRR 14.
[45] The European Court's judgement in *Malone*, paragraph 79.

the use that can be made of the information, the powers to set up arrangements for ready access to computer records that might "from time to time" contain useful information, and the powers to restrict disclosure of information about access to records, even to affected persons who turn out to be innocent of fraud.

The Commission would have wished the legislation to impose much tighter safeguards on access to personal data. The right of Housing Executive officials and social security officials to trawl through banking records, education records, utility records, and so on could be justifiable, to the extent that really was necessary to provide evidence of benefit fraud. However the legislation as currently framed is very far from the minimum interference with individual rights needed to secure that objective. The Commission has noted the increasing emphasis in HRA jurisprudence on proportionality, the principle that a sledgehammer should not be used to crack a nut. A more restrained approach, which would not necessarily harm the effectiveness of the law, could include a requirement for some form of prior authorisation or administrative or judicial oversight, perhaps including the issuance of a warrant or other written authority before records can be accessed. There can be very few circumstances in which the delay that a prior authorisation process would impose would seriously harm an investigation. The Commission accepts that sometimes it could prejudice an investigation if the suspect were notified (as would normally be the case in a judicial warrant procedure), but that is not necessarily always the case, and it cannot be used to justify the absence of any such process in cases where there is no reason to think that it would hamper the investigation.

In the case of the equivalent Westminster legislation, an assurance was offered by the relevant Secretary of State[46] that the accompanying Code of Practice would provide greater precision about the ways in which the powers would be used in a "reasonable" way. Some similar assurances have been made about the present Assembly Bill, and more could be sought; it is questionable whether the original assurance, made on behalf of the UK Government in respect of the Westminster Bill, could be said to bind either the devolved administration in Northern Ireland or, given its present lack of stability, any alternative arrangement. However, it is preferable by far that safeguards be built into the primary legislation, rather than in a document that is issued by the Department,[47] may be revised by it in whole or in part at any time,[48] requires the authorised officers only to "have regard to" its contents[49] and contains no criminal penalties for ignoring its recommendations.[50] In any event, the Human Rights Commission has not been consulted on, or provided with a copy of, the proposed Code of Practice under the Northern Ireland legislation, and so has no views on whether the current draft assists in establishing proportionality or reasonableness.

There is a political convention that parity shall be maintained in social security matters as between Great Britain and Northern Ireland. Clearly, if the Assembly were to reject or substantially amend this Bill, closely modelled on the Westminster Act, it would not only create a significant difference in the social security regimes here and in Britain but could offer people in Northern Ireland a substantially higher level of human rights protection. The Assembly must determine whether in this instance it is preferable to observe the political convention of parity or to go further than the Westminster Parliament thought necessary to

[46] In correspondence with the (Parliamentary) Joint Committee on Human Rights.
[47] S.3(1).
[48] S.3(2).
[49] S.3(6).
[50] S.3(7).

ensure compliance with the European Convention on Human Rights.

It should, in making that assessment, bear in mind the prospect that provisions in the Bill enacted in the proposed terms may be struck down by the courts and, failing that, the long-term impact on civil liberties of an enactment giving state officials almost unlimited powers to trawl through the financial and educational affairs of private citizens who happen to be claiming a social security or housing benefit. People who are not claiming benefit assume that their banking, financial and educational records are protected from arbitrary inspection by state officials. The Bill as introduced means that anyone claiming housing benefit or social security benefit, *or* who has a family member claiming such a benefit, can have all such records made available to an official who thinks that he or she has reasonable grounds for believing that an offence has been or is being committed, or is being contemplated.

Conclusion

The Northern Ireland Human Rights Commission takes the view that legislation of this kind, permitting access to financial and other records, can be justifiable and proportionate in some circumstances. Where a social security or Housing Executive official has reasonable grounds to believe that an individual is committing or has committed a benefit fraud serious enough to justify a major intrusion on their privacy, the official ought to be able, possibly after some internal authorisation process, to apply to a court for an order to access records where reasonable grounds can be shown for believing that the records will contain admissible evidence of the offence. Where this would not prejudice the investigation—for example, where the application related to transactions some time previously—the person affected should be informed, and given a right to appeal. It is difficult to imagine ways in which admissible evidence of an *intention* to commit fraud could be found through accessing such records, and the Bill should not give powers to investigate reasonable suspicion of intent; if such powers are enacted, the Code of Practice should severely circumscribe their use. Where no evidence of fraud is found, the person affected by an investigation should be told of the access, and any information obtained should be returned or destroyed.[51] No person should have their records accessed solely on the basis of being a family member of a suspect; if there is no reasonable suspicion that they have colluded or are colluding in an offence, their privacy rights should not be infringed. If there is such a suspicion, they should be dealt with on the same basis as the suspected fraudster; but an investigation of one person, or even proof of an offence by one person, should not trigger a loss of privacy rights by all members of his or her family.

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[51] The Department's evidence to the Committee indicated an intention to destroy data on innocent people, but not to inform them that the information had been accessed: *Report*, Annex A.