

For whose benefit anyway?

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Prosecution of social security recipients raises questions of social justice and fairness.

The legal practice undertaken at a community legal centre almost inevitably involves wider considerations than the theoretical application of the law. This article provides a brief insight into a particular aspect of policy and practice in the field of social security law. It is concerned with the social policy objectives of social security legislation and the conflict that arises when the intended beneficiaries of the legislation fall foul of it. The focus is on the exercise of discretion by the Department of Social Security (DSS) in referring individuals to the Commonwealth Director of Public Prosecutions (DPP), and by the DPP in proceeding with a prosecution. The observations made are best understood by reference to individual cases where contravention of the legislation leads to prosecution, summarily under the *Social Security Act 1991* (Cth), or on indictment under the *Crimes Act 1914* (Cth). The question raised by such cases is whether the exercise of the discretion fully recognises the broader issues or causes that lead to the creation of a welfare debt.

A case study

'Q' sought assistance from Springvale Legal Service, after being charged by the DPP for knowingly obtaining payment of a benefit which was only payable in part, contrary to s.1347 of the *Social Security Act*. Q was working as a part-time assistant in aged care. The work was available on a 'call' basis and the work varied between one and four shifts a week. During this time, Q claimed Job Search Allowance from the DSS. Q received these benefits without declaring the employment at the nursing home. He believed that the job was not permanent or frequent enough to warrant a declaration and, as he was actively seeking permanent employment, Q thought there would be an entitlement to social security benefits. Q received approximately \$6000 in benefits over a period of eight months, when in fact there was only an entitlement to \$1000 during this period. He did not deliberately intend to defraud the DSS. When notified of the overpayments, he immediately agreed to repay the overpaid sum to the DSS and expressed remorse for not informing the DSS about the employment. Despite the agreement and Q's explanation, the DSS referred his case for prosecution and the DPP prosecuted Q.

The sources relied on in exercising the discretion

The discretion to prosecute by the DSS and the DPP is based mainly on the circumstances of each case. There are, however, certain considerations or principles which have developed from various sources. These sources include the common law, legislation and ministerial and departmental policies. In recent times the courts have placed emphasis on the need to protect the integrity and effectiveness of the welfare system. In *Slattery v Davis* (1993) 111 FLR 250, the Northern Territory Supreme Court stressed the importance of imposing heavy penalties for social security offences. The Full Court of the South Australian Supreme Court in *R v Cameron and Simounds* (unre-

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ported, No. 4501, 1993) acknowledged that, despite the fact that many welfare recipients are subject to immense financial pressures and will seek to enhance their income by any means, the threat of substantial punishment is the only clear method of deterring people from engaging in fraudulent conduct.

It is understood that the welfare system in Australia must be protected from abuse, especially at times when there is restricted economic activity, fewer opportunities for employment and a reduction in welfare spending by the government. However, careful consideration must also be given to the circumstances of each 'offender' before a decision to prosecute, and hence punish, is taken. It is not desirable for the exercise of the discretion to prosecute to be based solely on a general principle of deterrence and punishment. The DSS has many avenues through which it may recover wrongful payments and the recovery of such sums may be harsh enough to deter those who have 'abused' the welfare system.

Certain factors are taken into consideration by a judge or magistrate when sentencing an individual under the *Social Security Act* or *Crimes Act*. These factors will include the nature of the fraud, including the length of the period over which the alleged fraud occurred, the means by which it was effected, the amount of money concerned, the motivation for the fraud, the willingness to repay the debt by the individual, and any prior convictions.² The severity of the sentence and, in some circumstances, the question of conviction, are based on these issues. When applied to this case study it appears that prosecution, although it may be successful in law, could be unduly detrimental from a social perspective. The period over which Q claimed unemployment benefits was eight months. In cases where gaol sentences have been imposed by superior courts,³ an eight-month period of offence has not usually attracted a term of imprisonment.

If prosecuted successfully, Q will be convicted and, given his lack of skills beyond general labouring, this is likely to be a further social and economic disadvantage. The options available to the Court include the imposition of a fine if it decides imprisonment is not warranted, or making a community-based order. These would bring added difficulties for Q, who is already struggling to make ends meet due to his uncertain income and also due to the agreement with the DSS to repay the debt. Given that Q sought benefits to ease his situation in the first place, the outcome has exacerbated his financial problems.

Another potential source for guiding the discretion is the *Social Security Act*. This however, does not include specific considerations to be taken into account when prosecuting for an offence under the Act. The Act only contains an indirect mechanism for such factors to be considered. Under Division 1, Part 7 of the Act, legislative powers are delegated to the Secretary for the general administration of the Act which list broad ideals or principles in administration (s.1296(a)). Obligations are also placed on officers of the DSS to have regard to any ministerial policy statements or directives (s.1297(1)-(4)). The problem is successive governments have as yet, not taken the opportunity provided by the Act to table a policy statement that recognises there are different levels of seriousness in social security offences. Such a statement would be used as a *general guide* for both the DSS and the DPP in making appropriate decisions. It is accepted that there can be no definitive set of criteria which could be applied so as to determine each case. It is desirable for less serious breaches of the Act that more emphasis be given to mitigating factors which would prevent 'unnecessary' prosecutions. This is

especially relevant where the DSS is likely to recover debts owed and the level of culpability or seriousness of the offence is not high.

The DSS currently follows a 'National Case Selection Guideline' contained in the *DSS Prosecutions Manual*. This manual is produced and ostensibly used by the Department in referring individuals to the DPP for prosecution, and provides the initial guide for the prosecution process. The Prosecutions Unit in the DSS, considers whether the circumstances of the particular case will fall within certain criteria including the following factors:⁴

- whether dual or multiple claims have been made over a period of time;
- the use of forged documents to support claims;
- the use of different or false names to obtain payment;
- whether the offenders have been convicted previously for social security offences or received a warning; and
- where the debt accrued is 'substantial', there is *serious* misconduct and that a message be sent to the community that such conduct is not condoned.

As the discretion can be based on one or more of the listed factors, the fact that Q received in excess of \$5000 over eight months and made multiple claims (due to the fortnightly certification requirements by the DSS) was obviously sufficient for his case to be referred to the DPP. Factors such as Q not having a prior record of social security offences, or that Q did not use false names or forged documents and did not seriously intend to defraud the DSS, did not weigh sufficiently against those few factors that supported a decision to prosecute. This raises the concern that in the exercise of the discretion the DSS is not giving sufficient weight to such individual circumstances. It places more emphasis on providing sufficient evidence to the DPP so that the DPP may successfully prosecute the offender in the 'public interest'. This emphasis becomes even more apparent at the next stage of the prosecution process.

Role of the DPP

Following a case referral the DPP considers various factors as part of its own departmental policy. The decision is based on two main limbs. The more significant, or practical limb, is whether there is sufficient admissible evidence to create a reasonable prospect of conviction.⁵ The second limb is the public interest limb, which *supposedly* takes into consideration, 19 factors that may 'define' the individual case. These include the seriousness of the offence, any mitigating or aggravating circumstances, the personal and financial circumstances of the offender, the offender's antecedents and background, *the need for personal and general deterrence*, *the effect on public order and morale*, whether the consequences of a conviction would be unduly harsh or oppressive, any entitlement of the Commonwealth to criminal compensation or reparation, and the offender's attitude and level of co-operation.⁶

If these considerations are applied to the case study, it seems that less weight was given to the public interest limb and more to the fact that sufficient evidence existed to procure a conviction. Despite Q co-operating with the DSS, agreeing to repay the debt, and the circumstances which originally forced Q to seek unemployment benefits still existing, there was insufficient justification to prevent a prosecution in the 'public interest'.

In fact, the DPP expressly acknowledges in its departmental policy that the 'proper decision' is to proceed with prosecution in many cases 'as a matter of practical reality'⁷ (emphasis added). Alternatively, it could be said that the need to deter, and the effect on public morale, as public interest considerations, carry more weight than the other public interest factors. This appears to tie back to the attitude of the judiciary, as discussed above, that deterrence and protection of the welfare system are primary considerations. This approach does not leave much room for consideration for those who contravene the *Social Security Act* by seeking benefits out of need rather than greed.⁸ It also raises the question of whether the public interest is really being served by prosecuting in addition to the burden of repaying the debt, especially in circumstances where the 'offenders' have not shown complete disregard or fraudulent intent in receiving benefits. This also indicates an inflexible approach to the exercise of the discretion if, in other cases similar to those handled by Springvale Legal Service, weight is placed on having sufficient evidence to procure a conviction or the need to deter.

Current policy and social implications

A government initiative in 1996 inviting members of the public to 'dob in a dole cheat' saw some 26,000 people referred to the DSS Recovery Section for investigation. According to the Minister for Social Security, the aim was to 'save the Australian taxpayer more than ten million dollars every week ... [and that] savings in future outlays ... are estimated to exceed six hundred million dollars in the next twelve months'.⁹ In the period dating from 1 July 1996 to 31 December 1996, 1118 people were prosecuted for social security offences and, of these, 1101 people were convicted.¹⁰ The main category of welfare benefits subject to review and where the majority of overpayments occurred was the 'Job Search and New Start' Allowance benefits.¹¹ Although the details of individual cases are not available, it seems the legal system's main emphasis is on protecting the welfare system from abuse, especially in the current economic climate. As important as this objective is, it is equally necessary to take into account the circumstances of individuals and particularly the long-term social consequences of prosecutions and the imposition of monetary or custodial penalties. The DPP's own annual statistics provide interesting results. The period examined follows the 1993 amendments to the penalty provisions in the *Social Security Act*.

For the period 1993-1994, prosecutions for contravention of Division 1, Part 8 of the Act proceeded summarily in 1744 cases and only seven cases proceeded on indictment.¹² For the period 1994-1995, 2580 cases proceeded summarily and only four on indictment.¹³ For the period 1995-1996, 2678 cases proceeded summarily and only five on indictment.¹⁴ These figures suggest that the DPP has dealt with very few cases of major fraud, reflected in the small number of cases that the DPP believed to warrant prosecution under the *Crimes Act*. It would be useful if a study of the individual circumstances of all the people prosecuted in those years were done, so as to be able to observe why some cases warranted prosecution under the *Crimes Act* and why the large majority proceeded summarily. Such a study was beyond the scope of this article which was based on the observations of a student practitioner at a community legal centre. Should such a study be undertaken, it would provide a more accurate picture of trends in the exercise of discretion to prosecute by the DPP and the DSS and whether the discretion is being properly exercised.

Six clients sought representation from Springvale Legal Service from November 1996 to January 1997 in relation to social security matters. They were all charged with contravening the *Social Security Act 1991*. In all cases, the individuals concerned were migrants and the majority could not speak or understand English. In each case, the clients were either employed part time or did work from home. In each case they failed to declare their employment or income. The motivation to claim benefits arose from misunderstanding as to entitlement to benefits, or from fear that their current employment would not last or did not generate sufficient income to cover their living expenses. In one case, benefits were sought to support a gambling habit that had arisen from adverse personal circumstances, involving the loss of wife and child in a tragic incident. None of these clients had prior convictions for social security or dishonesty offences. In each case, the individuals promptly agreed to repay the amounts. In some cases, clients repaid the debt in instalments as much as their income would allow without causing hardship, and in the other cases repaid the whole debt by borrowing from family and friends.

In cases such as this, it may not be appropriate to exercise the discretion to prosecute *in addition to* recovery of the debt. These people may already be undergoing financial and personal strain, let alone have the resources to obtain legal representation to handle their case. In the current environment, with the reduction in Federal Government funding of legal aid, the opportunities to seek relief from Courts at the sentencing stage (let alone seek to defend the charges) become even more limited. If the Government is really concerned about saving expenditure and reducing the burden on the Australian taxpayer, then that is a good reason for reducing the number of prosecutions that are pursued when circumstances suggest they are unnecessary. If the *Social Security Act* is the truly beneficial type of legislation it is intended to be, then for those 'beneficiaries' who fall foul of it and especially where *compelling mitigating circumstances* exist, there might be sufficient scope to consider a re-evaluation of the use of the discretion to prosecute.

References

1. A client of Springvale Legal Service. Other personal references are avoided, for purposes of confidentiality.
2. Noone, M.A. and O'Brien, F., 'Social Security Prosecutions', *Lawyers Practice Manual Victoria* LBC Services, pp.105/11-13.
3. In *R v Burke* (1986) unreported, County Court of Victoria, the relevant period was three years; and in *R v Rice* (1995) unreported, NSW Court of Criminal Appeal, No. 950444, the offender defrauded DSS for 19 years, yet received a prison sentence of 15 months, as the Court took into account the advanced age of the offender and willingness to repay the debt.
4. Department of Social Security, *Prosecutions Manual*, Reprint, Canberra, 1996, Chapter 9.
5. Director of Public Prosecutions (DPP), *Prosecution Policy of the Commonwealth*, 2nd edn; Canberra, 1990, Chapters 2.4-2.6.
6. DPP, above, 2.9 to 2.10.
7. DPP, above, 2.11.
8. Welfare Rights Unit, Draft Report, *Independent Social Security Handbook*, Melbourne, 1997.
9. Jocelyn Newman, Minister for Social Security, News Release, 13 February 1997.
10. Department of Social Security (DSS), 'Social Security Compliance Report', Canberra, 1997, Table 1.
11. DSS above, Table 3.
12. Director of Public Prosecutions, Annual Report 1993-94, Canberra, 1994, Tables 1(b) and 1(c), pp.128-31.
13. DPP, Annual Report 1994-95, Canberra, pp.105-109.
14. DPP, Annual Report 1995-96, Canberra, pp.70-72.