Early intervention and diversion as an alternative to social security prosecution

INTRODUCTION

This paper proposes early intervention and diversion as an alternative to criminal prosecution for alleged social security fraud in matters of low complexity. Diversion, it is argued, is a more appropriate response in light of evidence which suggests that those currently prosecuted are a vulnerable group of first offenders who have engaged in less complex overpayment type offences. Possible changes to Centrelink processes are described to illustrate an early intervention and diversion approach.

BACKGROUND

- In 2009-10 Centrelink referred 4,608 alleged social security fraud matters to the Commonwealth Department of Public Prosecutions (CDPP) of which 3,461 (75%) were prosecuted. As such, Centrelink referrals account for approximately 80 per cent of the matters considered by the CDPP.
- 87 per cent of the matters referred to the CDPP by Centrelink in 2007-08 related to less complex overpayment type offences: under-declaring casual earnings (37%), failure to declare part-time employment (30%), failure to declare full-time employment (17%), failure to declare partner income (8%).
- Research by the University of Wollongong, conducted in partnership with Legal Aid NSW, describes the typical profile of those criminally prosecuted as casual employees (72%), female (57%), with many in receipt of parenting payments (43%).
- Previous research by the University of Queensland supports the University of Wollongong findings and also suggests that most defendants (89%) have no previous fraud offences.
A DIVERSION APPROACH TO SOCIAL SECURITY PROSECTION

Who is currently prosecuted for social security fraud?

A 2010 report by the Australian National Audit Office (ANAO) provides detailed information about the type of alleged fraud matters investigated by Centrelink, and those subsequently referred to the Commonwealth Department of Public Prosecutions (CDPP) for prosecution action. According to the ANAO report, in 2007-08, low complexity fraud cases represented 92 per cent of Centrelink's fraud-related investigations and 87 per cent of cases referred to the CDPP. These matters are described as less complex employment type offences: under-declaring casual earnings (37%), failure to declare part-time employment (30%), failure to declare full-time employment (17%); and failure to declare partner income (8%).

Recent research by the University of Wollongong, conducted in collaboration with Legal Aid NSW, has provided information about the profile of individuals currently being prosecuted by the CDPP for social security fraud. This research suggests that the majority of those prosecuted in the criminal jurisdiction are female (57%), in receipt of either parenting payment (43%) or Newstart (37%), and overwhelmingly engaged in precarious, low skilled, casual employment (72%). The top three industries represented are hospitality (31.5%), cleaning (13%) and retail (9.3%). These finding confirm the results of previous Queensland based research. This research reported that 53 per cent of defendants were female and that most defendants (89%) had not previously been charged with a fraud offence.

What are the consequences of social security prosecution?

In 2009-10 a conviction rate of 99.3 per cent was reported for social security fraud matters proceeding to prosecution. Case law has established that, whilst the full range of sentencing options are available in social security fraud matters, a custodial sentence should be the starting point unless there are 'very special circumstances'. The recording of a criminal conviction, with or without a custodial sentence, can have significant individual and intergenerational effects including detrimental consequences for the offender's future employment prospects.

What is a diversion alternative to social security prosecution?

Diversionary mechanisms redirect an offender away from the traditional criminal justice system. The approach seeks to temper the punitive effects of criminal justice processes in recognition of the particular vulnerabilities of the individual. Such mechanisms are well established in the New South Wales criminal jurisdiction with schemes set up for young offenders, offenders with drug and/or alcohol addiction, and offenders with cognitive or mental health impairment. There is international precedent for diversion programs as an alternative to the prosecution of low-level welfare offences.

Diversionary mechanisms can be implemented at various points of the criminal justice process including pre-court, pre-sentence and post-sentence. In the context of low complexity social security fraud a Centrelink initiated, pre-court, approach is suggested. This
would build on recent Centrelink reforms which focus compliance interventions at the prevention and detection stages of the compliance continuum.\textsuperscript{18}

The suggested approach would involve early identification of individuals receiving social security overpayment and diversion of these individuals into alternatives programs which seek to address the underlying causes of the behaviour. An example might be a skills improvement program designed to improve financial literacy, better understand the rules for reporting income and assist individuals with strategies to avoid overpayment in the future.

**What are the objectives of an early intervention and diversion alternative to social security prosecution?**

The diversion alternative suggested by this paper aims to balance the Australian Government commitment to protecting the integrity of the social security system whilst:

- providing a more appropriate response for first offenders who are a vulnerable group of individuals unlikely to reoffend and whose offences are relatively minor;
- avoiding the negative labelling and stigma associated with criminal justice system contact;
- preventing a cycle of disadvantage by minimising a person's contact with the criminal justice system and the potential employment sequelae.

It is argued that pre-court diversion would continue to build on the Centrelink commitment to an increased focus on preventative controls.\textsuperscript{19} The approach would also further demonstrate the Australian Government commitment to current policy objectives including:

- the current Australian whole-of-government approach to managing social, health and welfare fraud which focus prevention at the service delivery interface;\textsuperscript{20}
- the early intervention and prevention principles for the Australian Government social inclusion agenda.\textsuperscript{21}

**Illustrating an early intervention and diversion approach**

To illustrate the suggested approach the following Centrelink process changes are described:

1. Improved debt prevention – enhancing the Centrelink/Australian Taxation Office (ATO) Pay-As-You-Go (PAYG) data-matching program;
2. Addressing overpayment at the service delivery interface – Developing systems, procedures, and alternatives for customer-oriented skills improvement.

1. Improved debt prevention – enhancing the Centrelink/ATO PAYG data-matching program\textsuperscript{22}

The Centrelink/ATO PAYG data-matching program identifies customers, or their partners, who may have income from employment that has not been correctly declared to Centrelink.\textsuperscript{23} Increasing the frequency of the Centrelink/ATO PAYG data-matching program could
facilitate earlier detection of both intentional and unintentional under-declaration of income. This is likely to result in smaller amounts of customer overpayment debt. Given that the Centrelink National Case Selection Guidelines (NCSG) for fraud investigation include the automatic referral of cases above a debt threshold it is likely that the early identification of these customers would reduce the number of Centrelink prosecution referrals. Further, identification of overpayment before significant debt accumulation occurs allows a greater capacity for overpaid customers to repay the debt, as well as reducing the growing administrative burden of managing an increasing Centrelink debt base.

2. Addressing overpayment at the service delivery interface – Developing systems, procedures, and alternatives for customer-oriented skills improvement

An early intervention and diversion approach would encourage preliminary corrective action with customers at the Centrelink service delivery interface. The current Centrelink compliance and fraud investigation processes, such as the data-matching described above, result in the majority of overpayment matters being referred to the Centrelink Fraud Investigation Team (FIT). Legal Aid NSW case work experience suggests that the management of cases by the FIT’s is primarily desk-based and generally directed towards collection of evidence for possible prosecution. Further, at least until recently, FIT case management has been largely effected by quantitative targets for review completion, CDPP acceptance and prosecution.

It is the position of this paper that, on early detection of an overpayment (whether intentional or unintentional), the opportunity for diversion is best considered and assessed outside of the FIT “investigative” culture. To this effect, it is noted that the current PAYG data-matching program protocol includes written customer contact in the event that a data-matching discrepancy cannot be explained by a customer record review. It is understood that this correspondence is sent by a customer service advisor from the local Centrelink branch inviting contact and discussion. This customer contact presents an ideal opportunity for local branch face-to-face assessment of customer suitability for referral to a skills improvement program.

As an example of a skills improvement program attention is drawn to the ‘Financial and legal literacy for Centrelink users’ pilot program currently under development by TAFE NSW. This program, planned for pilot in the Illawarra area in early 2012, seeks to ensure participants have the basic competencies required for the processes of reporting to Centrelink and managing day-to-day finances. As such, the proposed program includes elements such as understanding Centrelink reporting terminology, how to complete Centrelink forms, making up a household budget and strategies to keep track of household spending.
ACKNOWLEDGEMENT

This paper draws on the Legal Aid NSW social security case work and advice experience. Acknowledgement is made of the input of the following crime and civil solicitors: Jackie Finlay, Bill Gerogiannis, Catriona Cotton, Nerissa Keay, Michael Sergent, Margaret Pantall, and Margaret Wall.

FURTHER INFORMATION

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW lawyers provide advice, minor assistance and representation for social security matters in both criminal and civil jurisdictions.

Further information about this Discussion Paper or associated Legal Aid NSW civil law projects may be obtained from the Director – Civil Law on 9219 5828 or by email to monique.hitter@legalaid.nsw.gov.au

Further information about the 'Centrelink Prosecutions at the Employment/Benefit Nexus: A case study of Wollongong' is available from Dr Freda Hui - University of Wollongong - Social Accounting and Accountability Research Centre (SAARC) on 4221 3679 or fredah@uow.edu.au
REFERENCES

1 This paper is produced as part of the Legal Aid NSW commitment to the early intervention objectives of the National Partnership Agreement on Legal Assistance Services see Council of Australian Governments (2010) National Partnership Agreement on Legal Assistance Services <http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/Legal_Assistance_Services_NP.pdf>


3 CDPP advice provided to the Australian National Audit Office, 11 November 2009 as cited in Australian National Audit Office, Centrelink Fraud Investigations, Audit Report No. 10 2010-11, ANAO, Canberra 2010-11.


9 Centrelink (2010), Centrelink Annual Report 2009 – 2010, Commonwealth of Australia, Canberra at p. 71. 25 people were acquitted, 363 had no conviction recorded.

10 R v Purdon NSWCCA, 27 March 1997, unreported.


14 For example Sections 32 and 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) provide the Local Court with diversionary powers aimed specifically at defendants with a cognitive impairment or mental illness.


18 A significant such improvement was the change in Centrelink revenue provision from Bilateral Management Arrangement and the associated suites of Key Performance Indicators to direct appropriation as of 1 July 2009. For further information on the associated improvements see Australian National Audit Office, Centrelink Fraud Investigations, Audit Report No. 10 2010-11, ANAO, Canberra 2010-11.


21 It is worthwhile noting that the Joint Committee of Public Accounts and Audit have observed that debt prevention facilitated by effective data-matching is ‘vital in ensuring that clients do not accumulate a Centrelink debt’. It is understood that Centrelink are currently piloting a number of such data-matching debt prevention programs. See Joint Committee of Public Accounts and Audit, Report 404, Review of Auditor General's Reports, Parliamentary Paper 394/2005 at p. 112.


23 Centrelink (2010) Centrelink National Case Selection Guidelines (NCSG) have been developed in consultation with the CDPP to guide the types of cases that will be investigated and referred to the CDPP. It is understood that the current debt threshold for the NCSG is $10,000. See Australian National Audit Office, Centrelink Fraud Investigations, Audit Report No. 10 2010-11, ANAO, Canberra 2010-11 at 3.32

24 The debt base identified in the Australian National Audit Office, Management of Customer Debt – Follow-up Audit, Audit Report No. 42 2007-08, ANAO, Canberra 2008 had increased from $967 million owed by 548,700 customers at 30 June 2003 to approximately $1.3 billion owed by 651,540 customers. The ANAO are currently considering an audit to examine the effectiveness of Centrelink’s debt prevention activities.
