AUSTRALIAN SOCIAL SECURITY CRIMES: BASIC CONCEPTS AND UNDERSTANDINGS FOR NON-LEGAL PRACTITIONERS

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Abstract

Social security crimes could be committed intentionally or unintentionally by the claimant. Those who were facing charges by the plaintiff of Commonwealth Australian government Director of Public Prosecution (DPP) could experienced certain degree of anxiousness if without sufficient legal knowledge to understand the basic human rights available to defend oneself from being accused in law court. Limitation of legal assistance from the community legal centers would encourage do-it-yourself independent legal studies habit, where the defendant may need to prove the absence of dishonesty in the crime commitment. The article provides basic information on the social security crimes for those non-legal practitioners in the settlement of disputes of social security with the government of Commonwealth Australia.

INTENTION IN THE CRIME PARTICIPATION IN AUSTRALIAN SOCIAL SECURITY

Australian government do provide various forms of social security support for those eligible citizens and residents that require specific care, mainly in the form of financial welfare.[1] However, such payment from the government of Commonwealth Australia could be easily subjected to abuse, whether intentionally or unintentionally, by the claimant that approached Centrelink Australia for financial assistance and concession card application in order to cover the high living cost of Australia, mainly on short term basis.[2] The potential crimes that could be convicted are mainly of white collar[3], that are mainly committed by people employed in the clerical and professional occupation or related to the person engaged in administrative or clerical rather than manual work. Commonwealth Australia Director of Public Prosecution will need to prove the mens rea, or the root of the formation of the conspiracy with clear intent to commit crime, factors of the instigation towards the crime commission by the conspirator, precise contemplation of unlawful agreement etc, before charging the defendants in the criminal list of the law court.[4] The same principle is hold for any crime, that analogized abetting and aiding liability to one who counsels, procures or command one another in crime commission. In Australia, there are different established crime-related legislations that could cater the related offences, including the social security matters.[5]
Director of Public Prosecution (DPP) of Commonwealth Australia would normally sue the defendant of presumed criminal via information collected from the relevant fraud investigation team. However, cross examination of the evidences submitted may often offer unsatisfactory methods by opening the door to otherwise damaging and inadmissible information that the government agents learnt from the Centrelink's investigators. Example of inadmissible evidence is intercept evidence, such as evidence of a telephone conversation between the defendants in criminal conspiracy, is not accepted in English law. Obtaining information about the fraud engaged by the defendants illegally could breach human rights and privacy, and controversial raised whether evidence obtained by illegal or improper means should be admitted or rejected at court trial. If the breach has began from the part of the plaintiff or Commonwealth Australia Director of Public Prosecution (DPP), by collecting information of private life of the defendant, obtaining bank statement and social security communication details, that maybe irrelevant to the source of dispute, then the information collected by Centrelink Australia Fraud Investigation Team maybe excluded in law court submission. If such prosecution is allowed then overprosecution and management failures might occur in the part of the related government department of plaintiff, causing wastage of government and law court resources to sue the potentially innocent defendant for small mistakes, leading to inefficiencies when Alternative Dispute Resolution (ADR) has not even been applied sometimes by the plaintiff to simplify the dispute solution procedures.

If the Australian social security claimant being charged under Criminal Code Act 1995 (Commonwealth Australia), section 135.2 that may impose sentence of imprisonment of 12 months if found guilty, then such conviction may not be appropriate for mild offenders that merely forgot to report circumstances changes, innocent mistakes of law or the claimants etc, that may contradictory to Crimes Act 1914 (Commonwealth Australia), section 17A on the part of Commonwealth Australia Director of Public Prosecution (DPP). The judge in the case of social security fraud, accordingly, will need to determine whether the offences were committed for the reasons of "greed or need", and one of the mitigating factors will be that the offender "was in need but not greed motivation". Imprisonment sentencing will need to be carefully considered to ensure the mens reas inexistence to prevent abuse of welfare assistance of Centrelink Australia. Blind imprisonment may cause reoffending, and in such situation, alternative punishment for caution, namely by fine or community-based orders, may need to be considered by Australian law courts.
SENTENCING OF SOCIAL SECURITY FRAUD OFFENDERS

The defendants of social security frauds in Australia, if found guilty by the judges of law courts, could face a number of possible penalties. Some details of the offender's background, history of employment, relevant attitudes, health and education etc could be referred in the sentencing judgment evaluation with some concluding comments. For mild offender, the respondent will normally submit the opinion that "a term of imprisonment may not be the most appropriate sentencing option", "a period of supervised conditional liberty would offer little to the offender" and "a monetary penalty would be difficult for the for the respondent to comply with", with "home detention may prove to be an inappropriate option". Better alternatives could be "a community service order that may serve as a disciplinary measure and recompense the community" and "an unsupervised recognizance may serve as a sufficient deterrent in the matter" when the respondents' voluntary repayment commitments are upheld".[15] Since the social security fraud in Australia is a federal offence, Crimes Act 1914 (Commonwealth Australia), section 19-22 will be the best reference for sentencing, imprisonment and release of the conviction.[16] The presentence reports prepared by Commonwealth Australia Director of Public Prosecution (DPP) could also be challenged in its content. [17] If inappropriate sentences are placed towards the offender, then the sentence itself maybe so excessive or inadequate as to manifest such error.[18] If identified error was absent, an appeal against sentence will be impossible unless the facts of sentence were plainly unjust or unreasonable.[19]

OVERPAYMENT AND DEBT RECOVERY IN AUSTRALIA DUE TO ADMINISTRATIVE ERROR

Social Security Act 1947 (Commonwealth Australia), section 140(2) provides that overpayment of pension, allowance or benefit may be recovered from the claimant of financial support from Centrelink Australia under civil proceedings.[20] Once the civil recovery actions had begun then the other follow-up criminal proceedings against the claimant may constitute double jeopardy when Commonwealth Australia Director of Public Prosecution maybe prevented to sue the defendant with autre fois convict offence. Under the provision of Audit Act 1901 (Commonwealth Australia), "...overpayments of income tested pensions and benefits involving both administrative error and receipt in good faith maybe waived by a delegated officer...".[21] There are, in certain situations, overpayments that could be due to administrative errors of Centrelink Australia but not fully due to the errors caused or contributed by the beneficiary, inclusive but not limited to the most common omissions, machine error, mistakes by Centrelink officers of Commonwealth Australia, employees and agents.[22] The defendant may also be protected under receipt of good faith, without mens rea to intentionally deceive, where there was no fault on the part of beneficiary and the recipient could not have known or did not know that such social security payment was not eligible to be received.
ALTERNATIVE DISPUTE RESOLUTION TO DEAL WITH SOCIAL SECURITY FRAUD

When fraud is being detected accidentally in the Australian social security claiming, the relevant department, normally related to Centrelink Australia, should conduct internal investigation, correction and adjustment of the existing imperfect procedures prior to resorting to external law court actions, that could sometimes be cost inefficient, less effective and money wasting of the taxpayers' income.[23] Fraud and other potentially complex trials could have been bedeviled for years due to over-prosecuting and management failures, that may lead to abuse of law court process among the Director of Public Prosecutions (DPP), that should in fact cut down the evidence to bare essential and to ignore fringe suspects.[24] Alternative Dispute Resolution (ADR), namely via negotiation, mediation and arbitration etc, were recommended to be adopted by Commonwealth Australian government officers properly before the formal law court prosecution where investigation, preparation, committal, pre-trial review and trial the present arrangement could be blatant delay and abuse.[25]

COMPENSATION ELIGIBILITY FOR "MISCARRIAGE OF JUSTICE" IN AUSTRALIAN SOCIAL SECURITY FRAUD

Under Criminal Code Act 1995 (Commonwealth Australia), section 135.2, those offenders could be sentenced up to one year imprisonment if found guilty for conducting fraud in Centrelink Australia benefit claiming procedures, normally related to the receiving of financial assistance from Australian government where the claim was not entitled to. However, those convicted of the social security crimes, latter reversed of conviction on the ground of newly discovered facts beyond reasonable doubts, could seek compensation from Australian government for wrongful conviction if proven, as provided under International Covenant on Civil and Political Rights of United Nations, Article 14(6).[26] In United Kingdom (UK), almost similar provision is also available under Criminal Justice Act 1988 (UK), section 133(1). If Commonwealth Australia Director of Public Prosecution (DPP) wrongly sue the defendants who was latter found not guilty in reversed decision of judges of law court, then compensation maybe able to be sought from the part of plaintiff or law court.[27] Proper negotiation and investigation are recommended for DPP for the party of the Commonwealth Australian government before potentially lengthy and costly legal actions proceed, where the defendant maybe compensated if wrongly accused.

TRIAL IN SOCIAL SECURITY OFFENCES

Article 14(1) of the International Covenant on Civil and Political Rights upright the principle of fair trial in whatsoever criminal justice, inclusive of those related to social security. There are various ways where social security offences could be prosecuted, namely through Social Security Appeal Tribunal (SSAT), Magistrates Courts in Australia etc after preliminary investigations conducted mainly by the Centrelink Fraud
Investigation Team. Director of Public Prosecution will need to initiate the proceedings against the defendants, beginning from lower courts, whether under the state legislation of State Magistrate Court or Commonwealth Australia laws under Federal Magistrate Court of Australia, applying various court related acts and rules.[28] Usually Commonwealth Australia legislations will be applied against the social security offenders since Centrelink Australia is providing financial support for those in needs of different categories, namely for those needy students, sick, aged, unemployed, refugee, disabled etc, on behalf of the Australian government Department of Families, Community Services and Indigenous Affairs, and portion of the program could be connected to Department of Education, Employment and Workplace Relations (DEEWR) Australia. [29] Those claimant of various benefits from Centrelink Australia should also be aware of the potential offences that could be incurred. When such embarrassing situation of being charged of criminal offences of social security, then the defendants maybe entitled to various free legal advices from community legal centres with lawyer support. For those that did not opt to be represented but prefer self representation, such situation is common in lower courts but rare in higher courts, where the trial judge maybe under obligation to provide a degree of assistance during the trial.[30] There are various possibilities that the social security claimant could be prosecuted in tribunal and law courts, whether intentionally or unintentionally.[31] Natural justice for the defendant could be justified only if the plaintiff the Commonwealth Australia Director of Public Prosecution (DPP) could prove the criminal intention of the defendant beyond reasonable doubts.[32]

**CRIMINAL OFFENCES IN SOCIAL SECURITY SYSTEM IN AUSTRALIA**

Payment of various financial benefits under Australian social security system is pecuniary. Such welfare system could be susceptible to abuse by the officer-in-charge or the claimant intentionally or unintentionally, where the offender could be charged under Australian Criminal Code Act.[33] The offence of obtaining financial advantage by deception contains of 3 major elements (a) financial advantage (2) deceptive application (3) obtain via dishonesty.[34] Model Criminal Code of Australia, where many Australian federal and state criminal code derived from, provides that “obtaining financial advantage by deception: A person who by any deception dishonestly obtains for himself, herself or another any financial advantage is guilty of an offence.[35] Ignorant social security claimant is recommended to obtain assistance form completion in order to avoid unnecessary accusation of criminal where in fact the claimant could be needy in other equivalent form of fiscal support.

A person could be guilty of fraud if the judges are convinced that the defendant or the crime committer was aware that ordinary people would perceive the wrongdoings in a moral sense despite the prima facie legality of the activity.[36] If social security fraud has been conducted in a single event, whether due to intentional conduct or ignorant mistakes, then the related person could not be retried for offences in respect of which has been acquitted, and immune from further prosecution under the double jeopardy provision of the common law.[37]
APPLICATION OF LAW OF UNITED KINGDOM AS REFERENCE TO SOCIAL SECURITY FRAUD IN AUSTRALIA

In the British Commonwealth nations, Common Law related to theft could be applied as case law in the relevant situations. The fraudulent-related law of Australia in such situation are mainly derived from United Kingdom laws that can serve as beautiful examples, similar to False Claim Act 1863 (United States of America, USA) in misclaiming social security payment where such welfare systems are available in the advanced nations. In United Kingdom (UK), Fraud Act 2006 (United Kingdom) section 1(1) provides different way of offence commitment, section 2: fraud by false representation, section 3: fraud by insufficient information disclosure etc. Section 1(3)(a) of Fraud Act 2006 (United Kingdom) could be equivalent to Criminal Code Act 1995 (Commonwealth Australia), section 135.2, where a person found guilty of fraud on conviction summarily could be imprisoned not exceeding 12 months. However, the punishment alternatively for fine has been stated in the United Kingdom law but stated separately from Criminal Code Act 1995 (Commonwealth Australia) in other Australian legislation.[38]

Such similar white collar deception offences in United Kingdom (UK) could also be prosecuted under Theft Act 1968 (UK). The Law Commission of United Kingdom, when dealing with the problem of definition of too many offences as opposed to one offence covering various fraudulent conduct, stated that: “By relying on a range of specific fraud offences, defined with reference to different types of consequences, the law is left vulnerable to technical assaults.[39] In order to simplify the prosecution procedures effectively, general offences of fraud would be the preference, that could reduce the complication of the fraud law, whether related to social security or not, and could prevent the defense of double jeopardy in the part of the defendant.

ACTIONS OF RELEVANT AUTHORITIES IN THE PREVENTION OF SOCIAL SECURITY FRAUD

In the process towards the prosecution of Australian social security fraudster, there may be necessary to impose custodial sentence against the offenders when the offence become prevalent in certain period of time. As much information about the detected offences by the Centrelink Fraud Investigation Team, as possible, may need to be collected, screened and analyzed to prevent recurring of fraud. Collected material mentioned could serve as evidence in relevant law courts and tribunals that should be arranged, filed and further verified properly following standard procedures in order to be admissible when demanded in any part of the legal processes.[40] Social security fraud prevention, if without substantial mitigating circumstances, namely from Centrelink Australia and Department of Families, Community Services and Indigenous Affair Australia: (1) Social Security fraud should be treated seriously with deterrent penalty is called for. Such fraud threatens the financial security for community members in need, as a basis for
Australian social security system. (2) Custodial sentence is recommended to be applied in serious frauds without substantial mitigating circumstances, and fine should be imposed for first offence with mitigating circumstances when the social security fraud is difficult to detect. Appropriate and fair penalties against the fraudster should be considered to protect the revenue of Australian government.[41] Warnings may be given to the law court and tribunal before current standards of penalties imposed departed substantially, that could be varied from one location to the other, that should in fact be consistent sentencing in similar types of offences throughout Australia.[42]

**LEGISLATION FOR PROSECUTION OF FRAUD IN FEDERAL COMMONWEALTH AUSTRALIAN GOVERNMENT**

In Australia, Crimes Act 1914 (Commonwealth Australia) will usually be applied against the fraudsters that deceived enormous amount of money where the Commonwealth Australian government is entitled, for example, from subsidies, benefit and other entitlements. Prosecutions are also regularly brought under the provisions of Crimes Act 1914 (Commonwealth Australia) below: "False pretences (section 29A); Imposition (section 29B); Fraud (section 29D); Forgery and related offences (section 65-69); Stealing or receiving (section 71); Falsification of books and records (section 72); Bribery (section 73, 73A); Conspiracy to defraud [section 86(1)(e) or section 86A]". Minimum penalty for these offences is 2 years imprisonment for imposition under section 29B up to maximum penalty of 20 years imprisonment and/or a fine of Australian Dollar (AUD$) 200K for conspiracy of defraud under section 86A.[43] Since large amount of revenues from taxpayers and resources of Australia involved, fraud prosecution has constituted one of the largest amount of work for Commonwealth Australia Director of Public Prosecution (DPP) when the money of Australian government has been an attractive fraud target, amounted to Australian Dollar (AUD$) 148,121 millions for taxes, fees and fines in year 1988-1989.[44]

**DEFINITION APPLIED IN PROVING FRAUD IN AUSTRALIAN SOCIAL SECURITY FRAUD - DISHONESTY**

Although English Common Law or Law of Commonwealth has served as reference for the legal system particularly in the previous British colonies, yet there are slight differences observed in the definition of various terms used in criminal law, but bear the same objectives to deter criminal offences. In the definition of "dishonesty", the English Court of Appeal once said: "In their own lives they have to decide what is and what is not dishonest. We can see no reason, when in a jury box, [members of a jury] should require the help of a judge to tell them what amounts to dishonesty...it will be sufficient if the trial judge instructs the jury that the Crown must prove that the accused acted dishonestly.[45] Current standards of ordinary decent people could also be applied in the definition of dishonest application as well.
Ghosh formulation could also be applied in the determination of "dishonesty" among the defendants of Australian social security, via two stage test: (1) whether, what was done was dishonest, according to the ordinary standards of honest and reasonable people (2) whether the defendant himself must have realized that what he did was by those standards dishonest, if it was dishonest by those standards.[46] Commonwealth Australia Director of Public Prosecution (DPP) must prove beyond reasonable doubt that (a) the accused entertained no honest belief (b) the accused acted dishonestly. However, the accused does not have to prove his innocence.[47]

COMMENTS ON THE METHODS OF PROSECUTION OF SOCIAL SECURITY FRAUD IN AUSTRALIA

There are various ways that will enable Commonwealth Australia Director of Public Prosecution (DPP) to take actions against the social security fraudsters, mainly by civil and criminal proceedings. Many Commonwealth Australian government agencies will seek for those enforcement techniques that are the most resource efficient and apply the least investment for the best short term political results. However, these are seldom be applied in criminal prosecution even in Federal Commonwealth Australia social security department when plethora of techniques including negotiation, goods seizure, penalties compounding, penalty notices, cautions and citation with alternative methods short of prosecution has been practiced in the civil proceeding particularly among revenue agencies in Australia.[48] Prosecuting social security offences in law courts could be very expensive and unnecessary when legal actions against undesirable social behaviour is clearly not the only devices in the criminal justice system in Australia.[49] In certain fraud cases proof of fraudulent intent is necessary to justify the many evidences submitted by the plaintiff Commonwealth Australia Director of Public Prosecution (DPP) in order to determine the admissibility of many supporting material supplied before the judges.[50] In relation to all prosecution of offences against the law of Commonwealth Australia, the Director of Public Prosecution (DPP) has an over sighting role and may give directions or furnish guidelines to investigators, inclusive of Centrelink Australia Fraud Investigation Team in federal Australian government social security system.[51]
[11] Crimes Act 1914 (Commonwealth Australia), section 17A : Restriction on imposing sentences (1) A court shall not pass a sentence of imprisonment on any person for a federal offence, or an offence against the law of an external territory that is prescribed for the purposes of this section, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all circumstances of the case
[16] See Part IB, Division 3 - Sentences of imprisonment; Division 5 - Conditional release on parole or license; Division 7 : Acquittal because of mental illness; Division 9 : Sentencing alternatives for persons suffering from mental illness or intellectual disability; Division 10 : Miscellaneous
[17] See R v Webb (1971) VR 147; Stanton v Dawson (1987) 3 AcrimR 104-sentencing based on unknown material to the respondent
[22] U&SB Manual para. 22.811
[23] Other example of internal dispute settlement recommendation : Ogawa v Secretary, Department of Education, Science and Training [2005] FCA 1472 (21 October 2005), paragraph 9(1) and 9(2)
[26] "Where a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is provided that the non-disclosure of the unknown fact in time is wholly or partly attributable to him"
[31] Example offences are false incoming reporting, misclaiming the wrong package of assistance, providing wrong information of application etc
[32] Mens rea (page 1097) : the intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to actus reus (page 17) : action or conduct which is a constituent element of a crime – Oxford University, “Oxford Dictionary of English”, Second Edition (Revised), Oxford University Press, United Kingdom
[33] Derived from Theft Act 1968 (United Kingdom) c60, section 16, with updates reported controversially by Criminal Law Review Committee United Kingdom
[34] Example : R v Licardy (Unreported Supreme Court of New South Wales, Court of Criminal Appeal, Loveday AJ, Badgery-Parker and Bruce JJ, 26 May 1995
[42] Example is : Yadley v Betts (1979) 22 SASR 108 at page 114, per King CJ
[47] R v Mackey : Unreported, Supreme Court of New South Wales Australia, 27 July 1989
[51] See Director of Public Prosecution (DPP) Act 1983 (Commonwealth Australia), section 11