

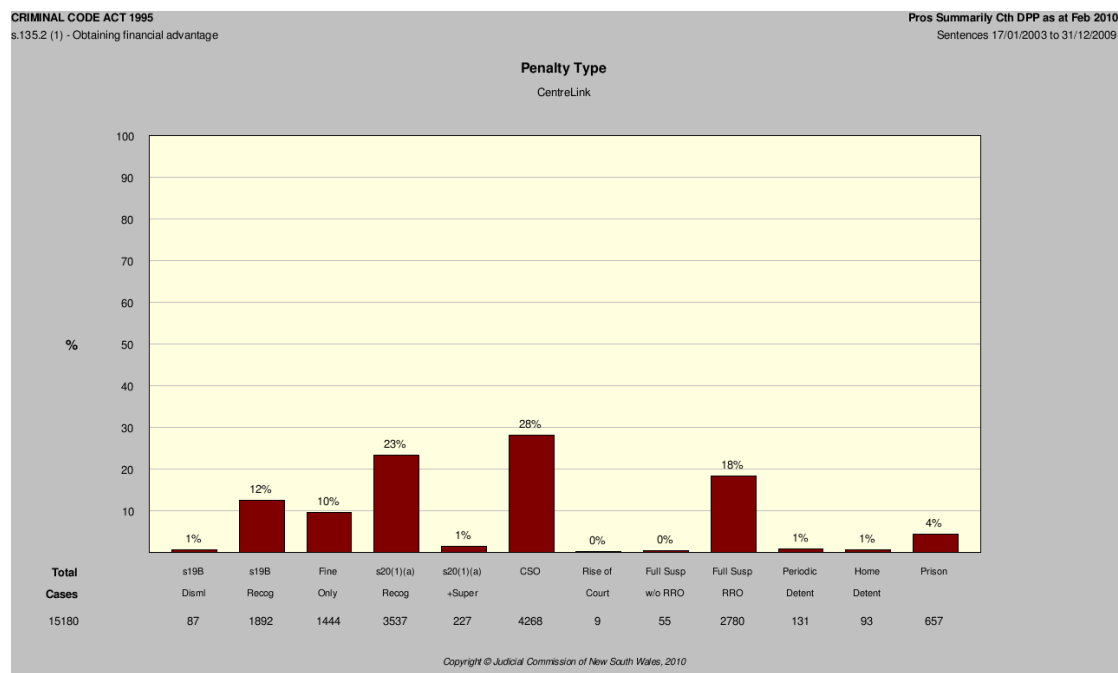
Social Security Prosecutions.

Firstly, I want to discuss a little about my experience as a criminal law solicitor at the Legal Aid commission and then outline a project that we have started in Wollongong to further assist defendants in Centrelink prosecutions.

Appearing for Defendants charged with Social Security Fraud

According to Commonwealth DPP statistics, since between 2003 & 2009 there have been 15,180 successful prosecutions in Local Courts across Australia for persons obtaining a financial benefit from Centrelink, knowing that they are not entitled to that benefit: s135.2(1) Criminal Code 1995.

The results of these matters are as follows -



In NSW over the same period there were 5500 people sentenced for these matters.

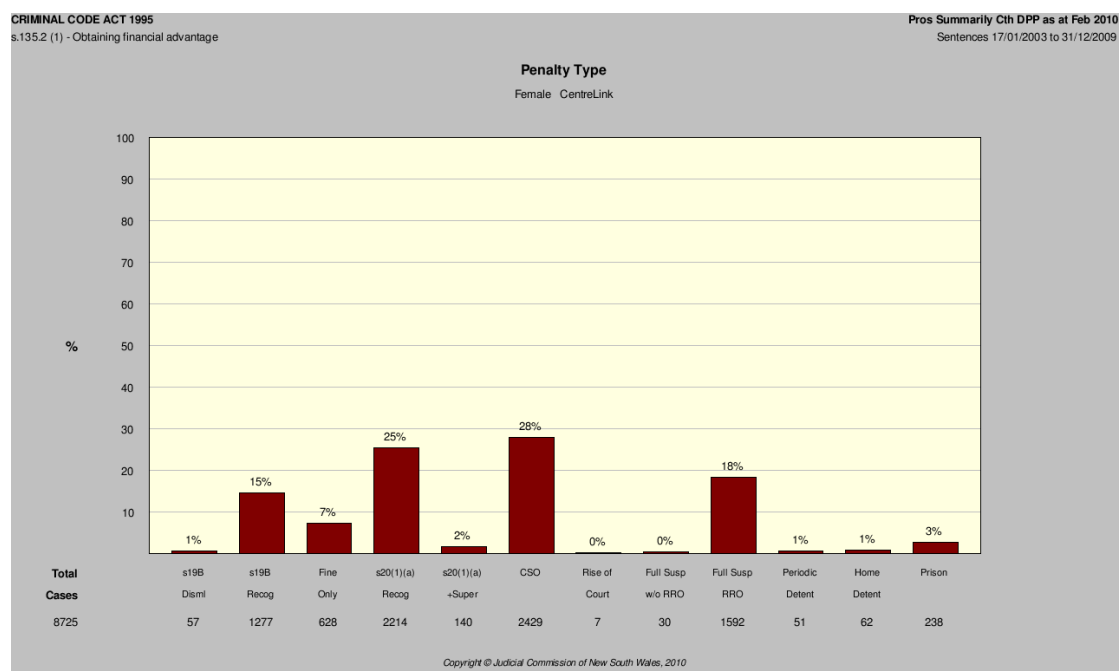
For the same period and the same offence, there were only 62 matters prosecuted on indictment.

I have worked as a duty solicitor at the Legal Aid Commission in NSW since 1998. The unusual features of these matters I find are that most of my Centrelink clients are not drug or alcohol abusers, that equal numbers of them are women and that they are people genuinely looking for work and who

worked in casual jobs were their hours and pay varied from week to week. Moreover the briefs in these matters are huge and require familiarity with figures.

Most crime is committed by men and most of our inmates in NSW are men. According to BOCSAR in 2008 women represented 11.8% of defendants in Local Courts and 10.9% of offenders sent to prison. Fraud is one category of offence that is commonly committed by women but a majority of offenders are still male.

The following graph shows outcomes for female offenders -



More than 50% of offenders are women which is significantly higher than for any other offence. Outcomes for men & women appear similar.

A typical case involves a person who gets a job which is casual. Some weeks they earn a really good income and the next week they may not be called into work at all. Their pay week might be from Tuesday to Tuesday and they get paid on a Thursday. Centrelink forms require a person to estimate their income for a calendar week, and they want an estimate of gross income, not net income.

This is really difficult for an educated person. Centrelink do not even do precise calculations but rely on an average of income per day.

The other notable thing is that the sentencing regime for these offenders is really harsh. Commonwealth Prosecutors consistently remind Local Courts of *Purdon's* case (unrep, 27/3/97, NSWCCA) and the principle set out below:

The rationale stated for the rule that a custodial sentence is to be imposed for social security fraud except in very special circumstances is that the offence is easy to commit but difficult to detect, it is widespread, and the introduction of more checks upon applicants for social security would cause delays in the payment of benefits and therefore hardship to those whose need is urgent. It has also been said that the rule reflects a concern for the protection of the revenue, but I would prefer to express it as a concern for the additional burden upon all taxpayers who shoulder the heavy burden of providing the funds for the social security system to operate and the even heavier burden created by the widespread abuse to it by frauds such as these. The rule is not based upon the fact that many of the frauds are perpetrated for motives of greed rather than need. Both types of fraud are widespread. They are equally difficult to detect. If the fraud is based upon a perceived need, a custodial sentence must be expected except in very special circumstances. If the fraud is based on greed, the custodial sentence will be longer.

The figures above suggest that this principle is not applied in Local Courts. And nor should it.

Prosecutions often allege frauds of thousands of dollars, but if these sums are averaged over the charge period they are often small sums which are used each week to pay for food and rent, not luxury items.

The maximum penalty for this offence in the Local Court is 12 months imprisonment. This is less than for shop stealing, driving while disqualified and breaching an AVO. Many offenders have no prior criminal history.

As clients often complain, they have paid back the money, or have been paying back the debt through with holdings for sometime. Recently I have noticed Centrelink add an administrative penalty of an 10% in some matters.

If in 1997 the offence was prevalent and difficult to detect, the opposite is true today. There are 1000s of prosecutions each year and where the offence involves an under declaration of income, it is easily detected by data matching. That is, a comparison of income declared to Centrelink with income earned as reported to the ATO. These frauds are typically unsophisticated and ill-planned.

Purdon's case itself involved a debt of \$86,377.40 which was prosecuted on indictment and in Purdon's case a sentence of 9 months periodic detention was imposed.

It is certainly true that the principle is outdated and inappropriate to summary matters, and for this reason it is largely ignored.

Sometime ago I wrote a paper for a Masters of Criminology course on disparity between the courts treatment of those charge with Centrelink fraud and those charged with tax evasion. I also sought to show that this double standard further marginalised women in receipt of income support and those who struggle financially.

In 1999 Justice Simpson said in *R v Hart* -

...I agree with what has frequently been said. Social Security fraud is theft from the revenue and is an imposition on every honest taxpayer in the Commonwealth of Australia. It is a most serious offence.

I cannot, however, ignore nor participate in the perpetuation of the apparent double standard that applies, and treat Social Security fraud as different from taxation fraud. That such a double standard apparently exists was conceded by the Crown in the course of argument. To my mind the two offences are indistinguishable. Each involves fraud on the revenue and each imposes a greater burden on honest taxpayers.

There are ample precedents for lenient sentences being imposed on tax offenders, often in relation to vastly larger sums of money and in cases where the mitigating circumstances are less compelling than in this case.

unrep, 26/7/99, NSWCCA

The CDPP statistics show that there are far fewer prosecutions for tax fraud. In Local Courts for the same period above there were 14 prosecutions for the same offence where the informant was the ATO. There were 111 prosecutions on indictment.

One reason for this vast discrepancy is that Centrelink overpayments (unlike tax underpayments) are easily detected. Tax fraud is more complex and sophisticated and usually not perpetrated by employees.

Good character appears to attract a greater emphasis in tax fraud. And greater empathy: nobody likes to pay tax.

The corollary of this is a lack of empathy for those on income support. This is often implicit in remarks on sentencing which speak of the welfare burden. As cited above, the CCA referred to " the additional burden upon all taxpayers who shoulder the heavy burden of providing the funds for the social security system to operate."

I have previously mentioned the size of briefs in these matters. I often find that the tendency to serve every single piece of paper that supports the prosecution case is daunting to defendants, their representatives and the Court. Many of the documents are unintelligible screen dumps or electronic records of letters sent.

Uneducated people find it difficult to defend these matters. As the issue in hearings is often knowledge defendants often give evidence. Defendants are cross examined on their bank records from years ago, on copies of letters sent and asked to recall how they completed each of their centrelink forms. Hearings are protracted and complex and patience is sorely tested.

I have appeared in a number of cases where I believe persons innocent of fraud (knowingly obtaining a benefit they knew they were not entitled to), are convicted. And most are too fatigued by the process to appeal.

Legal Aid Pilot Project

Since late last year, Wollongong Legal Aid Office has been trialling a joint project between our civil law and criminal law sections. The aim of the project is to utilize administrative law review in appropriate cases to improve outcomes for clients charged with Centrelink Fraud.

Areas of interest were identified matters which include -

- a failure to declare a marriage-like relationships;

- where clients have been paid a benefit they were not entitled to but may otherwise have been entitled to a payment from Centrelink;
- where there are special circumstances such as intellectual disability or special hardship;
- where there is a pattern of both under and over declaring income; and
- where a Centrelink error is suspected, including miscalculation of overpayment.

In appropriate cases when a client is seen in the Criminal Law section, consent is obtained for a FOI request. FOI requests might double the size of a file, but they often uncover documents not included in the brief which are helpful to the defence.

Civil lawyers have skills in reading and deciphering internal Centrelink documents which are invaluable to busy criminal lawyers. In one matter which is listed for hearing this month inquiries by our civil law team has revealed numerous prior debts suggesting a consistent pattern of difficulties with Centrelink requirements.

Where appropriate, administrative review is considered. We have had some success in reducing the amount of debts claimed and reducing charge periods. For example an FOI request revealed payslips which had been provided to Centrelink which were not included in the assessment of the overpayment. Decisions to undertake administrative review will be considered on a case by case basis.

In some matters a referral might simply be assistance with debts and bankruptcy options at the end of a prosecution.

Having more than one solicitor working on a matter and utilising civil remedies where appropriate can only improve outcomes for clients. If we do not achieve a demonstrable reduction in convictions or penalties, we are confident that these complex matters have been thoroughly investigated and prepared.

In addition the project has identified that defendants in the Illawarra more commonly come from the following three work areas -

- casual teachers
- casual nurses aids
- university students.

The project aims to provide community legal education to remind people of the dangers of under declaring income or failing to advise Centrelink if they cease studies or decrease contact hours to a part time load.

Prevention is undoubtedly better than the cure.