FRAUD

Taxation *v* social security fraud

MERRIN MASON comments on the sympathetic reporting of taxation fraud cases in the 1990-91 Annual Report of the Commonwealth Director of Public Prosecutions.

It is not a new observation that ripping off the Taxation Office is considered by many to be a socially acceptable activity, while any attempt to obtain benefits from the Department of Social Security (DSS) to which one is not entitled is roundly condemned. Why should this be so when the two offences involve mostly similar elements and produce the same outcome?

Two of the cases reported in the 1990–91 Annual Report of the Director of Public Prosecutions involved barristers who pleaded guilty to one count each of imposing on the Commonwealth contrary to s.29B of the *Crimes Act*. Both had understated their incomes by approximately $100 000 over three-year periods, evading the payment of about $50 000 each. Neither had any previous convictions. The first was sentenced to six months' imprisonment suspended upon entering a good behaviour bond for 12 months. He was barred from practice for six months by the Victorian Bar Association. The second was sentenced to three months' imprisonment, also suspended upon entering a good behaviour bond. He was barred from practice for three months.

Another case involved two estate agents who sold real estate in false names and operated bank accounts in false names to conceal their property dealings. The total amount of tax evaded was $404 000. No prior convictions were mentioned for either of them. Both were sentenced to 18 months' imprisonment suspended upon entering into good behaviour bonds. They were both subsequently disqualified from acting as estate agents.

Only one case study of social security fraud was reported and this involved a defendant with many previous convictions. It is therefore not a useful comparison. In the 1989–90 Report, however, there was a case worth comparison. This involved two people who were apparently not social security recipients. One worked for DSS and set up bogus claims. The other (not an employee of DSS) set up bank accounts into which the benefits were paid. Over a three and a half year period they received about $160 000 ($80 000 each). Both pleaded guilty to 20 and 22 counts respectively of defrauding the Commonwealth. Both were sentenced to four years' imprisonment with a minimum term of two and a half years. Neither is reported as having any previous convictions and there is no mention of what mitigating factors were raised.

While this case does not fall into the category of struggling welfare recipient trying to make ends meet, it does indicate the different approach taken to social security fraud. The person who was not employed by DSS (and hence not also guilty of defrauding his employer) should be compared with the estate agents who also set up false bank accounts to receive their ill-gotten gains. The estate agents defrauded the Commonwealth of approximately $200 000 each while the social security fraud was $80 000 each. One got a suspended sentence and the other a minimum term of two and a half years. While such comparisons are based on sketchy details of the cases involved, it is the way that such cases are reported in the annual reports, as much as the actual outcomes that is indicative of the different attitudes to the two types of fraud.

The Report notes that each magistrate in sentencing the taxation fraud defendants referred to the likely consequences on their professional and community standing. For the estate agents the Report notes that sentencing was affected by the defendants' backgrounds and the fact that they had lost community respect and professional standing. There was no reference in the Report to the outrageous greed that appears to motivate these crimes. It is obvious that the barristers must have had high incomes to be able to understate their incomes by these amounts, and it is of course well known that barristers are well paid. One of the defendants was a Queen's Counsel. Real estate agents also are usually reasonably well off.

In the case of both types of fraud, matters considered to be serious fraud are charged under the *Crimes Act*. The elements of the offences are the same. So is the outcome, namely that the Commonwealth is denied funds to which it is entitled. Each person who evades tax thereby increases the tax burden on those who pay tax, in the same way that social security fraud does. One suspects too that the amount of money lost through taxation fraud far exceeds that lost through social security fraud. Yet the outrage from taxpayers is usually reserved for cases of social security fraud.

Cases of social security recipients imprisoned for fraud where need is a relevant factor were not reported in the annual reports, but do exist. The particular issue of women in Western Australia being imprisoned for social security fraud received much media attention in 1988.[1] The DPP decided to defend their actions in their 1988-89 Annual Report. Since then it appears that decisions to prosecute are considered more carefully by the DSS, but some individuals prosecuted still appear to receive unduly harsh sentences.

In determining sentence the magistrate or judge will take into account among other factors character evidence. This usually includes evidence of community standing and testimony from respected people who know the defendant. A high community profile and public respect are often seen as mitigating factors, and the effect on these of the conviction is seen as a type of punishment and in this way also mitigates sentencing. It could be

BRIEFS

argued that high community status carries with it a certain responsibility that has been breached, making the offences more rather than less serious. By contrast, a social security beneficiary is unlikely to be able to call character witnesses well known and respected in legal or business circles. Should a person be penalised because poverty and other social disadvantage make them less likely to be involved in and recognised for community activities? Should a person be able to gain advantage from a so-called 'social standing' which is often based mainly on wealth or at least made possible by it, particularly when the conviction is for accumulating some of that wealth in a criminal, fraudulent manner?

The effect on the defendant's employment is also mentioned as a mitigating factor in the tax fraud cases. Certainly the estate agents suffered, as they were disqualified from acting as estate agents. Both barristers, however, were barred from practising for only a few months and then they presumably returned to their practices. Their employment is unlikely to be significantly affected, precisely because tax fraud is seen by many as a legitimate practice and the defendants as unlucky to be caught. The effect on the employment prospects of an unemployed recipient of social security benefits is likely to be significant. A criminal record will hinder them in obtaining employment, and would probably have a much greater impact on their future careers than a criminal record would for someone who is employed and established in their field.

Social security fraud needs to be treated more rationally and fairly, and a comparison with taxation fraud points out a reasonable perspective on the crime. Unfortunately the issue is predominantly one of attitude, and attitudes are often slow to change.

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Refer nces

1. McClements, Jill, 'Criminalisation of the Poor', (1990) 15(1) *Legal Service Bulletin*, p.22.

TENANTS

A landmark decision

ROBERT MOWBRAY reports on a recent NSW Supreme Court decision which accords public housing tenants natural justice where termination notices are issued.

Much heralded reforms to residential tenancies legislation in New South Wales in 1989 did not guarantee a right to shelter. A recent Supreme Court decision is, however, a small step along the way.

The Department of Housing in New South Wales used to issue termination notices as a way of ensuring that tenants became starkly aware of problems about the tenancy: rent arrears, nuisance or damage, for example. There was always then a period of negotiation and compromise, and eviction rarely ensued if efforts were made to remedy any difficulties.

Section 58 of the *Residential Tenancies Act* 1987 (NSW) allows an owner to give 60 days notice of termination of a tenancy, without cause. The Department, whose leases are covered by the Act, has taken to using this provision to evict public housing tenants.

They issued such a notice, stating no reasons for eviction, to a Mr Nicholson. The matter went to a single judge of the NSW Supreme Court in December 1991, by way of stated case from the Residential Tenancies Tribunal.

In a landmark decision, the court declared that the decision of the Department to issue a termination notice pursuant to s.58 was invalidated by the Department's failure to accord to the tenant procedural fairness. The court ordered that the Department's decision to issue a termination notice be quashed, and added that if the Department should decide to issue a fresh termination notice then it must 'heed what has been said in this judgment'.

Mr Nicholson had not challenged the Department's right to issue a termination notice; he argued that the *decision to exercise this right* was subject to an obligation to accord procedural fairness. The court agreed. It found that the decision of the Department to exercise its contractual right to give a termination notice under s.58 of the *Residential Tenancies Act* was a decision to which the rules of natural justice apply, requiring procedural fairness.

In summary, the court decided that before a public housing tenant can be evicted, the Department must accord that tenant natural justice by making available any adverse material in its possession which it proposes to take into account when coming to a decision about eviction. It then must give the tenant an opportunity of dealing with that material. If the tenant has been refused access to adverse material, and denied an opportunity of responding to it, then the court will quash the termination notice.

The tenant 'was entitled to entertain a legitimate expectation of security of tenure, and was therefore entitled to procedural fairness in respect to a decision to deprive him of it'. Putting it another way, the court held that if a tenant 'in fact enjoyed the benefit of tenancy' she or he has a legitimate expectation of procedural fairness in respect of any decision which would adversely affect the benefit of tenancy.

The decision of the NSW Supreme Court has clear implications. The Department of Housing has two options. It must issue a termination notice alleging breach of the agreement or, prior to serving a termination notice without relying on a breach, it must establish and implement clear procedures which give the tenant access to any adverse material in its possession which it proposes to take into account when coming to a decision about eviction and, further, it must give the tenant an opportunity to be heard fairly and to refute that material.

The Department has since appealed to the Full Court of the Supreme Court.

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