



CDPP

Australia's Federal Prosecution Service

Commonwealth Director
of Public Prosecutions

GPO Box 21, Melbourne VIC 3001
Level 16, 460 Lonsdale Street
Melbourne VIC 3000
DX. 446
Telephone (03) 9605 4333
Facsimile (03) 9670 4295
www.cdpp.gov.au

Your Reference:

Our Reference:

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Madam

Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

The CDPP seeks to make a further submission in response to submissions lodged by Legal Aid NSW and the Law Council of Australia.

Response to submission by Legal Aid NSW

Legal Aid NSW argues that the proposed amendment is likely to impact disproportionately and unfairly on people prosecuted for social security fraud. The CDPP believes that that concern can be largely allayed. As the Legal Aid submission notes, the vast majority of social security prosecutions are dealt with summarily.¹ Of those, by far the majority of defendants are charged under section 135.2 of the *Criminal Code* (Cth) (**Code**) (the summary offence of obtaining a financial advantage). Only a small number of defendants are prosecuted summarily for general dishonesty offences.² General dishonesty charges under section 135.1 also make up a minority of the cases prosecuted on indictment.³

The statistics set out in the footnotes reflect the CDPP's *General charging policy in social security fraud matters*.⁴ The policy provides:

¹ According to the CDPP's 2015-16 Annual Report, 1,246 cases referred by the Department of Human Services – Centrelink (**Centrelink**) were dealt with summarily, compared with 29 cases dealt with on indictment.

² In 2015-16, 1,232 people referred by Centrelink were dealt with summarily under section 135.2. Eight people were dealt with summarily under section 135.1(1) and/or 135.1(5). The remainder were dealt with under other provisions of the **Code**.

³ In 2015-16, 20 people referred by Centrelink were charged on indictment with obtaining financial advantage by deception contrary to section 134.2 of the **Code**. Six people were charged on indictment under section 135.1(1) and/or 135.1(5). The remainder were charged with other offences.

⁴ Revenue and Benefits Fraud Practice Group Instruction number 6 available at <https://www.cdpp.gov.au/publications/general-charging-policy-social-security-fraud-matters-pgi-rbf-6>

1. The decision whether a matters proceeds on indictment or is dealt with summarily should be made in accordance with the *Prosecution Policy of the Commonwealth*.⁵
2. Only more serious offending should proceed on indictment. Less serious offending should attract summary charges under section 135.2 of the Code.
3. Ordinarily the CDPP will charge more serious offenders on indictment with obtaining financial advantage by deception contrary to section 134.2 of the Code.⁶ However, the CDPP will charge a defendant with general dishonesty under section 135.1 of the Code where appropriate; for example, if the defendant received numerous payments over a lengthy period and it would not be practical to prosecute sufficient charges under section 134.2 to reflect the criminality of the conduct.

That policy will not change if the proposed amendment is passed and the maximum penalty for general dishonesty offences is increased. Consequently Legal Aid's fear that the CDPP will be less likely to agree to summary disposition of general dishonesty charges⁷ is not well founded.

As to the argument that the proposed amendment tends to create inconsistency with other offences, the CDPP contends that the factors outlined in our written submission to the Senate Committee point to the contrary conclusion.

The CDPP disputes the assertion that offending involving fraudulent schemes is also addressed under the *Taxation Administration Act 1953* (Cth).⁸ Serious taxation fraud is ordinarily prosecuted under one of the fraud offences in the Code whereas the Taxation Administration Act addresses less serious offences, often of a more administrative nature, none of which carries maximum penalty of more than 2 years' imprisonment.

The CDPP views the proposed increase in the maximum penalty for general dishonesty offences as important to address serious examples of fraud that, for reasons canvassed in our written submission to the Committee, cannot be appropriately dealt with by way of other charges under the Code. Sentencing judges will retain the discretion to take circumstances of hardship into account in fixing a penalty, but will also be provided greater latitude to address very serious frauds.

The Legal Aid NSW submission relies heavily on statistics derived from the Commonwealth Sentencing Database (CSD) (referred to the submission as JIRS – the platform on which the CSD can be accessed). We point out that some care should be taken in relying on those statistics. For each prosecution, the CSD shows only one sentence. If a person was prosecuted for multiple offences, the CSD only shows the sentence imposed on one charge (usually the highest individual sentence). Thus, for example, one of the offenders represented in Figure 1 of the submission as having been sentenced to 36 months' imprisonment in fact received a total head sentence of five years; the sentence of 36 months related to one of a number of offences with which the offender was charged.

CDPP Response to submission by the Law Council of Australia

Whilst the general dishonesty offences were originally intended to capture less culpable conduct than other dishonesty offences in the Code, experience has demonstrated that they have a role to play in some cases of serious offending. As pointed out in the CDPP's written submission to the Committee, the CDPP's *Practice Group Instruction on charging dishonesty offences under the*

⁵ <https://www.cdpp.gov.au/publications/prosecution-policy-commonwealth>

⁶ the maximum penalty for which is 10 years' imprisonment

⁷ p10 of the submission

⁸ p10 of the submission

*Criminal Code*⁹ provides that ordinarily charges of obtaining property or financial advantage by deception will be preferred over general dishonesty but recognises that there are circumstances where general dishonesty charges may be more appropriate. The statistics referred to above bear out the fact that general dishonesty charges are used more sparingly than deception charges.

Paragraph 15 of the submission conflates representative and rolled-up charges; the two are separate concepts. It is not envisaged that general dishonesty would be used as a vehicle to pursue a duplicitous, rolled-up charge. Such a charge, if it were being contested, would be rightly open to being struck down. There is however scope to utilise a general dishonesty charge to cover some repetitive conduct that constitutes an ongoing course of conduct. The common law has always recognised that, subject to the terms of the offence provision being to the contrary, where conduct 'could fairly be regarded as forming part of the same transaction or criminal enterprise'¹⁰ that conduct can be charged in a single count. The CDPP contends that section 135.1 can be interpreted as encompassing continuing criminal enterprise or course of conduct offending.¹¹

Further, contrary to the Law Council's submission, it is hard to conceive a case where adequate particularisation does not allow a defendant to understand and defend the case that is being put against him or her.

Finally, as paragraph 7 of the *Practice Group Instruction on charging dishonesty offences under the Criminal Code* notes, there are other circumstances where a general dishonesty charge may be more appropriate than obtaining by deception.

If you require any further information, please contact Fiona Thompson

or

Yours faithfully

Shane Kirne
Practice Group leader
Commercial, Financial and Corruption

⁹ <https://www.cdpp.gov.au/publications/dishonesty-offences-under-criminal-code-pgi-cfc-3>

¹⁰ *DPP v Merriman* [1972] AC 584

¹¹ See for example *Grenfell v R* (2009) 196 A Crim R 145 where it was tacitly accepted that a charge under section 135.1 involving a repeated course of conduct was valid.