

## Social Security Law Practitioners Association

Welfare rights aspects of benefit fraud

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## Welfare rights & benefit fraud

- The policy context
- Links between civil and criminal law
- The relevance of civil law
- Some common welfare rights aspects of fraud cases
- Improving links between criminal law and social security law practitioners

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## The context

- High political profile – annual frenzy about statistics
- 2004/05: £357m fraud = 26% of all overpayments. Weak statistical methodology.
- DWP PSA to reduce fraud and error. PRP for DWP fraud staff
- Most fraud is small & informal
- In 2005/06:
  - 440,732 investigations
  - 8,218 prosecutions completed (1.8%)
  - 10,870 admin penalties in lieu of prosecution (doubled since 1999/00)
  - 411 custodial sentences

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### Links between criminal offences and civil law

- Ss111A (1A) & 112 Soc Sec Admin Act 1992 contain most common offences
- S 111A (1A): change of circs, D knows should be reported and dishonestly fails to give prompt notification. Similar offences if done by third party

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### Civil law aspects

- Reg 32 (1B) Claims & Payments Regs: duty to report C of C which might reasonably be expected to know might affect benefit entitlement. R(IS)9/06 (B v SoS W&P) held that DWP must give unambiguous instructions to claimant to make this effective
- Reg 88 HB Regs – similar for HB
- S71 SSAA: Claimant can resist recovery of an overpayment (not HB/CTB) if instructions are ambiguous

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### ...therefore...

- Information and instructions given by DWP and/or LA to the claimant may be crucial to both civil and criminal liability
- Reasonableness test still applies to reporting changes of circs (CFC/2766/03)
- No duty to disclose materials fact already known to DWP (e.g. CIS 1887/02)
- Duty to disclose can be modified by advice from DWP officer (R(A) 2/06)

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### Social security law aspects

- In some cases substantive entitlement defeats a prosecution (e.g alleged living together or capacity for work cases)
- If an overpayment is small or not recoverable, is it in the public interest for prosecution to continue? (Crown Prosecutor's Code para 6.5 (a),(c), (d))
- True level of overpayment crucial for sentence (e.g. Stewart, Graham & Whatley)
- Notional in-work benefits relevant (R v Parmer)
- Appeal Tribunal before criminal hearing?

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### Common welfare rights issues

- May be entitled to benefit even if guilty
- Basic errors: substantive entitlement, missing premiums and arithmetic
- Inflated figures – e.g. DWP include periods after material facts known to them
- Fail to revise or supersede decisions
- Fail to include underlying entitlement (esp in HB cases – Reg 104 HB Regs)
- Fail to calculate notional in-work tax credits and benefits.

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### Common welfare rights issues

- Identify underclaimed benefits: mitigation & repayability of overpayments
- Is there a case for waiving recovery?

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### Improving links

- DWP fraud staff, decision makers and debt recovery staff need to liase more
- Criminal practitioners must never accept DWP/LA figures and assessments without an expert, independent view on entitlement and recoverability. Role of expert witness
- WR advisers need to know when to refer to criminal practitioners
- Shortage of skilled WR advocates to do appeals – LSC exceptional funding?
- A seminar and/or special interest group?

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# **Benefit fraud**

## ***Welfare rights checklist***

### **PART ONE – SOME THE CRIMINAL LAW ASPECTS OF BENEFIT FRAUD**

#### **Which Offence?**

1. Has client been charged under the Social Security Administration Act 1992 ("SSAA") or Theft Act 1968?
2. If they have been charged under the SSAA is it with the less serious offence of 'knowingly' or the more serious offence of 'dishonesty'?

#### **Knowingly (s.112 SSAA 1992)**

3. Did client know or reasonably should have been expected to know they should have informed DWP/LA?
4. Did client know that the material facts affected entitlement to benefit?
5. What evidence of instructions by DWP/LA to client to inform them?
6. What is the Crown's/Local Authority's evidence of:
  - (a) False statement?
  - (b) Representation?
  - (c) Producing or furnishing documents?
  - (d) Providing information which was false in a material particular?
  - (e) Non-reporting of change of circs
  - (f) Not giving prompt notification?
  - (g) Causing or allowing another to fail to give prompt notification?
  - (h) Lack of prompt notification?

7. If charged under s 112 SSAA 1992 – check whether the proceedings started within statutory timescale and has appropriate certificate been issued? – (s 116 SSAA 1992).

**Dishonestly (s111A SSAA 1992)**

8. What is the Crown's evidence of dishonesty? (in addition to points above)
9. Did client know that the material facts affected entitlement to benefit?
10. What is client's explanation, if any, for not reporting material fact to DWP/LA?
11. Were written or other instructions from LA/DWP to report relevant facts/change of circumstances, unambiguous?

**What if client is offered an 'administrative penalty' as an alternative to prosecution ? (s 115 SSAA 1992).**

12. As well as issues above, what evidence is there that it appears to DWP/LA that there are grounds for instituting proceedings?
13. Has client been given the relevant notice?
14. If client has agreed to penalty, is it within 28 days, thus enabling withdrawal?
15. If agreement is outside 28 days, did grounds for penalty not exist or was there any misrepresentation or pressure on client?
16. Is there a case for DWP/LA to waive recovery of the overpayment, e.g. financial hardship and/or medical reasons? (See DWP guidance: *Overpayment Recovery Guide*).

**PART TWO: SOCIAL SECURITY LAW ASPECTS OF BENEFIT FRAUD**

**Is there any underlying entitlement to benefits?**

17. Was client still entitled to benefits even if may have dishonestly failed to inform DWP/LA?

18. If still entitled to the benefits, did they have a duty to inform DWP/LA? (eg started low paid employment for a few hours a week).

**Are overpayment decisions on entitlement and/or recoverability correct?**

19. Has an appeal been properly made against the overpayment(s)?
20. What are the arrangements for Tribunal representation to hear the appeal? Has a suitably skilled adviser been contacted? Is there a case for LSC Exceptional Public Funding? (s 6 (1) (a) Access to Justice Act 1999 and Directions Part C LSC Manual Volume 1 Part C).
21. Is the overpayment decision valid?
22. Has decision maker changed the original awards of benefit? (eg s71(5) SSAA).
23. Is the notice of overpayment valid?
24. Has overpayment been correctly calculated?
25. Has underlying entitlement to the benefit in question been included in the net overpayment?
26. Does overpayment include any payments which were made after material facts relevant to alleged offence were known to the DWP/LA? (for example, after DWP carry out a General Matching Service scan, or after Interview Under Caution)
27. For HB/CTB, was there any element of official error in the overpayment?
28. Were written or other instructions from LA/DWP to report relevant facts/change of circumstances, unambiguous?

**Are there other benefits which could be claimed?**

29. If the client has failed to declare work, are there in-work benefits and tax credits to calculate for use in mitigation?
30. Are there other benefits the client could have claimed, e.g. because of disability, ill-health or caring responsibilities?

31. Is true loss to the public purse so small as to make prosecution inappropriate? (See CPS code).
32. Is there a case for DWP/LA to waive recovery of the overpayment, e.g. financial hardship and/or medical reasons? (See DWP guidance: *Overpayment Recovery Guide*).
33. Should a welfare rights expert be instructed to explore the above and what should their instructions cover? What will be the arrangements for ongoing liaison between instructing solicitor and expert witness?
34. What are the arrangements for a welfare rights adviser to liaise with Defence?

**DISCLAIMER:** This checklist is not designed to be legal advice and it does not cover every aspect or scenario concerning social security fraud. It should only be used by appropriate legal advisers who have obtained a clear picture of relevant facts and evidence in a particular case and who have researched relevant law.

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