



### Characterisation of social security fraud as omission or commission offending

Instruction Number: 4

Last Update: 19 December 2014

Following the High Court decisions in *DPP v Poniatowska* (2011) 244 CLR 408 on 26 October 2011 and *DPP v Keating* (2013) 297 ALR 394 on 8 May 2013, it is important to determine whether social security fraud offending is offending by commission or omission, especially when the relevant change in circumstances occurred prior to 4 August 2011, meaning that section 66A of the *Social Security (Administration) Act 1999* cannot be relied upon. In making that determination in the circumstances of the given case prosecutors are to take into account the general principles set out below.

#### General Principles

1. In determining whether offending is omission or commission offending, one must identify the conduct which resulted in the particular financial advantage being obtained and determine whether that conduct was an act or a failure to act.
2. Offences involving false statements are offences of commission. Generally, offences of commission are simpler to understand and therefore prove. In these circumstances, where possible, charges framed in this way should be preferred.
3. If a person submits a form each fortnight containing false statements, each false statement constitutes a separate offence by commission. The benefit received each fortnight is as a result of the most recent false statement.
4. If a person makes a false statement and as a result obtains a financial advantage, it is one commission offence so long as that false statement results in that consequence. One false statement may result in the obtaining of a benefit over a number of weeks, months or years. The offending does not become omission offending merely due to the passing of time.
5. If a person is taken off a reporting regime as the result of a false statement, benefits received after that time are received as a result of the false statement. Such offending is commission offending, with the relevant act being the most recent false statement, which resulted in the person being taken off reporting and continuing to receive benefits to which they were not entitled.
6. Such offending should not be charged as a false statement offence followed by an omission. Section 66A does not impose a duty to correct a false statement that was deliberately made to the Department, as there would be no relevant event or change which could trigger the duty.
7. It is not necessary for the person to know why they were taken off reporting. With regards to any difficulty in proving the person's knowledge, if for example the false statement is a person claiming to be unemployed when they are not, the obvious inference would ordinarily be that they would know that was the reason they were receiving unemployment benefits (when they were working), regardless of how long that continued. In any case, a concern in establishing the knowledge element of the offence does not affect the identification of the conduct that results in a person obtaining the benefit.
8. The offending may continue to be commission offending even if there are periods in which the statement is not false, for example if a person receiving unemployment benefits is temporarily unemployed. In such cases, the focus should be on DHS's reason for making the payments and whether DHS is paying the person on the basis of the original false statement or on some other basis. It does not matter if a significant period of time has passed since the original false statement was made. The offending may still be commission offending, as long as the person intentionally made a false statement to DHS and, during the periods of offending, the person knew or believed that they were not entitled to the payment.

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9. In the case of unemployment benefits, the offending also continues to be commission offending, if the Centrelink recipient changes employer or starts working for an additional employer(s).

**Scenarios – characterisation as omission or commission:**

**Customers taken off reporting regime**

10. The person is entitled to the payment and is not subject to a reporting regime. Subsequently, an event or change of circumstances occurs, the person does not inform Centrelink and is overpaid. That is conduct by omission.
11. The person then makes a false statement/s to perpetuate the payment when not entitled and the payment continues. That is conduct by commission. There may be circumstances where a charge/s for the false statement/s as a separate offence/s may be appropriate depending on whether or not the false statements are made in a document and the seriousness of the conduct.
12. The person is entitled to the payment, reports ongoing income in the correct amount which is recorded by Centrelink and the person is then not subject to a reporting regime. The person's income later increases but they do not inform Centrelink of that event. That is conduct by omission.
13. The person is entitled to the payment, under reports ongoing income which is recorded by Centrelink and the person is then not subject to a reporting regime. That is conduct by commission.
14. The person is entitled to the payment and is subject to a reporting regime as they have properly informed Centrelink that they are working. The person under declares their income so that they are partially disentitled. This is conduct by commission.
15. The person then does not work for a period, correctly declares no income and there is no overpayment. They are taken off reporting. They then recommence employment, but do not inform Centrelink of that event and declare no income. The conduct that results in the second overpayment is conduct by omission.

**Multiple employers**

16. The person makes a false statement that they are unemployed, when they are actually working for employer A. After a few months, they stop working for employer A and start working for employer B. The conduct continues to be conduct by commission even after the person starts working for employer B, as they are still being overpaid based on their false statement that they were unemployed.
17. The person makes a false statement that they are unemployed, when they are actually working for employer A. After a few months, they also start working for employer B, while continuing to work for employer A. This is conduct by commission, including in relation to the work for employer B.



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