

Issues paper: problems with member of a couple decisions made by Centrelink investigations teams

Welfare Rights Centre, Sydney

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1 Background to the paper

The Welfare Rights Centre, Sydney is receiving an increasing number of calls from people who say Centrelink has accused them of having had a partner over a long period and has asked them to repay a very large debt. Some Centrelink decisions about "members of a couple" are backdated to create massive debts, some ranging from \$100,000 to \$200,000.

Many of these clients are vulnerable women and include single mothers, women from non-English speaking backgrounds and women who have experienced domestic and family violence.

The question of who is a member of a couple (or not) is one of the most difficult assessments that Centrelink officers are required to make. The Federal Court has commented on how difficult these decisions can be. Because these assessments are so complicated, and the possibility of error is so high, it is critical that complex personal, social and cultural issues are taken into account from the outset.

The Minister for Human Services has agreed to examine circumstances where large Centrelink overpayments can arise when Centrelink backdates a decision that a person is a member of a couple. The Minister for Human Services responded quickly to the report on this issue in the media in August 2012 and asked his Department to have discussions with Centrelink staff on cultural issues affecting member of a couple decisions.

The Welfare Rights Centre welcomes the invitation from the Minister's office to provide a discussion paper on the issue for the Minister's consideration.

2 Recommendations

The paper identifies and analyses the main issues of concern as follows:

1. Number of decisions overturned on appeal
2. Failure to consider all of a person's circumstances
3. Over-reliance on documentary evidence
4. Clandestine nature of investigations
5. Undue weight on factors that are effectively beyond the person's control

6. Failure to have sufficient regard to cultural factors
7. Problems with backdating decisions
8. Cost to individuals
9. Cost to public purse

These issues are discussed in turn below in section 3.

The recommendations of the paper to address these issues are:

1. That the Minister and his Department, in consultation with the WRC:
 - a. Conduct a review of how cases are identified for investigation as potential major debts, as opposed to local office review of member of a couple assessments
 - b. Conduct a review into the costs of major investigations taking into account, among other things, whether debts raised as a result are later found not to exist or not to be recoverable
 - c. Conduct a review into the issues around keeping investigations concealed from the person being investigated with the aim of developing guidelines for determining the appropriateness of this in particular cases
 - d. Develop guidelines for diverting some of those cases, as appropriate, for standard “member of a couple” reviews rather than major debts, particularly where a person has informed Centrelink of changes to living arrangements and/or there has been a failure for Centrelink:
 - i. to make a timely decision in response to that information
 - ii. to review their circumstances in response to the information provided
2. Development of a relationship between investigation teams and the Welfare Rights Centre, including:
 - a. Training by our Centre based on our unique perspective in assisting clients to appeal member of a couple decisions, preferably co-ordinated with the Centrelink Multicultural Services Unit; and
 - b. Development of a referral protocol, where member of a couple debts of a certain size are automatically referred by the investigation team to the Welfare

Rights Centre, with streamlined processes for reconsideration where our Centre considers there is persuasive evidence that the person is not a member of a couple

3. Review decision-making processes to ensure that there is adequate guidance for decision makers on how to weigh mandatory factors under s 4(3) of the *Social Security Act* with particular focus on:
 - a. the interaction between cultural considerations and section 4(3) factors
 - b. having proper regard to and weighing all relevant factors
 - c. caution against over-reliance on documentary evidence and overweighting of financial considerations
 - d. caution against over-weighting of factors beyond a person's control

These recommendations respond to specific and recurring issues that Welfare Rights has observed in its casework practice. These specific issues are described and analysed in more detail in section 3 below.

3 Problems with Centrelink decision-making

3.1 Many decisions overturned on appeal

Correct decision-making about a person's relationship status is critical to the proper administration of the social security and family assistance payment system as it determines a person's rate and qualification for certain payments.

Appeals statistics reveal a high error rate for member of a couple decisions. The SSAT sets aside or varies 38% of these decisions. This is a substantially higher rate than the average percentage of Centrelink decisions changed by the tribunal.¹

Case study – principal carer grandmother

¹ See the Social Security Appeals Tribunal Annual Report 2010-2011 at 37 (at http://www.ssat.gov.au/media/10489/ssat_annual_report_2010-11.pdf).

This year our Centre represented a client with a debt of well over \$150,000 resulting from a Centrelink member of a couple decision at the SSAT. Our client had care of her grandchildren after both her daughters died. Her ex-partner returned to the home because he was unable to afford his share of the mortgage and rent elsewhere. In the interests of raising the grandchildren, they chose to live separated under the one roof rather than force the sale of the home.

Centrelink decided that our client was a member of a couple and backdated the decision by nearly a decade, resulting in a huge debt and the cancellation of her income support payments. The SSAT found that the member of a couple decision was incorrect, her payments should not have been cancelled and there was no debt. One of the troubling features of this case was that our client's Centrelink file showed clearly that she had told Centrelink almost 10 years earlier that her ex-partner had moved back into the home and explained the reasons why. Centrelink did not review her "member of a couple" status then or for the next 10 years, until it decided to raise a huge debt, alleging she had concealed a relationship over that time.

Centrelink decisions in this case violated basic principles of procedural fairness. The decisions were proven to be incorrect, but only after our client experienced the emotional and psychological distress and financial hardship of having her income cut and repaying the debt and faced allegations of dishonesty and the risk of criminal prosecution. It was extremely difficult to gather evidence concerning such a long period and it is likely our client could not have succeeded without representation.

As this example suggests, the most serious cases are those where Centrelink decides that a person is a member of a couple and then backdates that decision over many years. This results in huge debts, often ranging from \$100,000 to \$200,000. In effect, Centrelink alleges that the person has concealed a relationship in order to receive money to which they are not entitled.

3.2 Failure to consider all of a person's circumstances

It is a clearly established principle in this area of law that a decision-maker must consider the totality of a person's circumstances, including circumstances that point both towards and against the existence of a member of couple relationship.

Our Centre regularly sees cases where Centrelink investigators concentrate only on circumstances pointing towards the existence of a relationship, without considering evidence before them pointing against it.

3.3 Over-reliance on documentary evidence

Centrelink investigators rely heavily on documentary evidence, which is the easiest evidence to gather, such as bank statements. But documentary evidence is often misleading when there is no investigation into the reasons behind the arrangements.

Documentary evidence is usually relevant to the financial arrangements and address history (for example, bank accounts and RTA records). Over-reliance on documentary evidence often results in over emphasis on financial arrangements. Financial arrangements are only one of five factors which social security law requires Centrelink to consider. Centrelink must also consider the nature of the household, social aspects of the relationship, sexual relationship and nature of their commitment to each other.

3.4 Clandestine nature of investigations

Over-reliance on documentary evidence is compounded by the fact that these investigations are often hidden from the person until the end of the investigation. The person is not given the opportunity to explain the financial arrangements or address history until the end of the investigation. The allegations are often not put to the person until the point at which a huge debt has been, or is about to be, raised. At that point the person is often:

- too frightened (having been told of the possibility of prosecution) to tell their side of the story; or
- perceives that it is hopeless to try to persuade the investigator otherwise; or
- is unable to collect the evidence needed to counter the documentary evidence and disprove the allegation

Example:

In one case, an investigation began in 2008. It was not finalised until mid 2010. In that time the potential debt had increased significantly and because the investigation was conducted in secret our client was not given the opportunity to explain her relationship with the alleged partner or take any further steps necessary to establish her separation under social security law.

When Centrelink contacted her about the investigation in 2010 she took further steps to separate, including obtaining a formal divorce and Centrelink readily accepted that she was single. This could have happened in 2008.

Further, in the above case, the extra two years meant that:

- It became harder for her to disprove the allegation because evidence was lost or harder to obtain
- The additional cost to the public purse was substantial

3.5 Undue weight on factors that are effectively beyond the person's control

A common mistake in the cases we see is a failure by the investigator to properly evaluate the weight to be given to evidence of arrangements that are effectively beyond the control of the person.

Single mothers, for example, often have particular difficulty in trying to disprove member of a couple allegations because of the actions of their ex-partner, ie actions over which she generally has no control. Common examples are where the ex-partner:

- lives with other family members or in informal renting/lodging arrangements or is homeless (ie he cannot produce documentary proof of his address by way of a lease etc);
- visits the house regularly to see the children (this can look like co-habitation to surveillance teams);
- for reasons of convenience or perhaps laziness, continues to use her address for mail (eg, because he finds it convenient to collect his mail when visiting children);
- pays child support via informal arrangements (eg, by paying utility bills).

3.6 Failure to have sufficient regard to cultural factors

Under social security law, the decision-maker is required to consider the reasons behind a person's arrangements with an alleged partner and their overall circumstances, we repeatedly see incorrect decisions resulting from a failure to understand the significance of a person's cultural background.

Some women face high levels of family and community disapproval of separation and divorce and this can lead to arrangements which Centrelink investigators misinterpret as evidence of a member of a couple relationship. It may be virtually impossible for them to effect a formal property settlement or obtain a formal divorce in the face of disapproval and isolation, and we have seen Centrelink decision-makers place too much reliance on this and fail to acknowledge our client's attempts to explain why this has not happened. It can also be difficult for these women to exclude ex-partners from their homes, which can be interpreted by Centrelink decision-makers as co-habitation. In one case, a client travelled overseas with an ex-partner

because it was unacceptable to him and her family that she travel unaccompanied, but this was still used as evidence she was in a continuing relationship.

3.7 Problems with backdating decisions

Centrelink raises these large debts by backdating its decision that the person was a member of a couple.

In our experience, these decisions are made without considering evidence on the file showing that the person has properly informed Centrelink about changes to their living arrangements and other circumstances and that Centrelink failed to make a timely decision in response.

As the example given earlier of the grandmother who told Centrelink when her ex-partner moved back into the home shows, backdating the member of a couple decision in such cases violates basic principles of natural justice and administrative fairness. It also ignores limits in social security law on Centrelink's power to backdate adverse decisions.

This is particularly unfair where, at the time the person voluntarily provided information or provided all the information asked of them. If Centrelink had made the decision that they were a member of a couple at the time, it would have been far easier for the person to have collected evidence to show that they were separated, or to have taken further steps to separate if required. Centrelink's failure to do so in fact induces people, quite rightly, to assume that Centrelink regards their current circumstances as separated.

The general power to backdate decisions is restricted by section 118 of the *Social Security (Administration) Act 1999*. Our Centre is concerned that Centrelink will often have little or no regard to s118, which prevents the backdating of adverse decisions in certain circumstances (for example, where a person did not cause the debt by making a false statement or misrepresentation).

Without legal representation, these debts are often virtually impossible to challenge due to prosecution risk and the difficulty of providing or countering evidence for periods so far into the past. It is absolutely critical that large debts are raised only in clear-cut cases which have been fully investigated, as once raised challenging them can be virtually impossible.

3.8 Cost to individuals

Inaccurate decision-making in this area has a devastating physical, emotional and financial impact on the individuals affected. It is also contrary to the public interest in efficient administration.

In our Centre's experience, these huge debts impact disproportionately on women, especially single mothers and women from culturally and linguistically diverse backgrounds. They have a

devastating impact on people's lives, causing emotional distress and psychological injury and financial hardship to already vulnerable people. They are also exposed to the risk of prosecution for fraud offences.

3.9 Cost to public purse

In our experience, Centrelink may devote substantial resources to investigating a person's member of a couple status, only for those decisions to be overturned at the SSAT. Many of these investigations take several years to finalise. The cost to the commonwealth includes:

- The costs of investigation
- The costs of appeal (to the ARO, SSAT and AAT)

Running these cases is extremely resource intensive for the Welfare Rights Centres, State Legal Aids and other community legal sector organisations.