Some Impending Legal Problems for Social Workers

FRANK BATES – Reader in Law, University of Tasmania

Abstract
Many areas of the law with which social workers are required to deal are particularly dynamic and, in order to meet the challenges they present, it is necessary to look ahead. Developments in the United States often provide a useful means of predicting developments in Australia. The paper examines three areas, proceedings, social security law, and mental health – where change is becoming, or likely to become, apparent. In the first topic, there has been a marked change in both the issues with which the courts have had to deal and the methodology which they have adopted to attempt to resolve them. In social security law, decisions of the Administrative Tribunal have illustrated anomalies and deficiencies in the legislation, and social workers in their daily practice may notice others. All of that might well lead to a necessary review of the legislation. In the area of mental health legislation, a draft bill in Victoria contains a number of disquieting features which should cause social workers, as well as lawyers, concern. The paper concludes by noting that the legal relationship between social workers and the law has never been more subject to scrutiny in a wide variety of situations, and mutual respect between the two disciplines must continue to increase.

Frank Bates LL.M. (Sheff.) M.A.C.E. is Reader in Law, University of Tasmania. He is a Vice President of the International Society on Family Law and the Children's Bureau of Australia and has been awarded a Senior Fulbright Scholarship for study in the United States to research into comparative family support systems at Northwestern School of Law, Lewis and Clark College, Portland, Oregon. Recent publications include The Family Law Casebook (with J.N. Turner), The Australian Social Worker and the Law (2nd Ed. with others) and Principles of Evidence (3rd Ed.).

1. Introduction

"To know the rights and wrongs of [a] situation", writes McClean, "in legal terms, is as much a part of the social worker's equipment as are his powers of reasoned persuasion". Powers of reasoned persuasion tend to have a timeless quality, whereas change is of the very essence in relation to law: Livermore, writing in relation to commercial law, has wittily observed that writing a legal text in that area was, "...akin to lying in the track of Concorde in the hope of seeing one of the hostesses." The same is true of those areas of the law which most affect the social worker. In the family law area, in Victoria, the nature of the adoption jurisdiction has been modified by the Children (Guardianship and Custody) Act 1984, which seeks to curtail adoption by relatives. The Federal Law Reform Commission is presently undertaking a study of family property law. In the area of social security law, the work of the Administrative Appeals Tribunal and the reporting of its decisions have drawn attention to anomalies in, and the excessive technicality of, the Social Security Act 1947, as repeatedly amended. Examples proliferate, but a discussion of recent developments is insufficient. In order to be able to deal with problems as they arise, it is necessary to look ahead, to attempt to ascertain what new legal problems are likely to affect the social worker in the coming years. It is the purpose of this paper to guess at some of them and to suggest how social workers, and others, can deal with them.

2. Child Custody Problems

It has long been recognised that disputes over child custody are difficult (see Kocis v. Statz [1964] N.S.W.R. 667 at p. 669 per Herron C.J.) and it may be as Chisholm and Petre, have observed, that they are becoming more difficult as courts seek to ensure that the welfare of the child is, indeed, the paramount consideration as is required by s 64(1) (a) of the Family Law Act. Additionally, the whole context of the resolution of these disputes is changing: the days are gone when the criteria perceived as being used by the courts in resolving such disputes could usefully be enumerated (cf Bromley). New situations involving the lifestyles of parents continually occur and it must be said that in this area, as in so many others, note can profitably be taken of developments in the United States, as patterns of behaviour and culture tend to be repeated later in Australia.

One of the major functions which the state, or agencies approved by the state, has assumed from the family is that of formal education. (Musgrove). Although, in Australian law, in the case of In the Marriage of Newbury (1976) F.L.C. 90-205 at p. 76.070, Demack S.J. had stated that, in his opinion, "...the Court should not be directly involved in answering the question which school a child is to attend. However, he, later, went on to say that, "perhaps there may be circumstances when the choice of school is so deleterious to the welfare of the child that it will raise the whole issue of who is to have custody, but it is difficult to envisage this being the only circumstance which called for a change of custody". Conversely, in In the Marriage of Bishop (1981) F.L.C. 91-016, Treyvaud J. had made such a decision when a serious doctrinal dispute had arisen between the parents as to which kind of school the child ought to attend. Elsewhere, I have said that these cases ought to put us on our guard: in Australia, the struggle for funding between state and private school education is unlikely to abate and, although the battle may ultimately prove to be largely about money, ideology of whatever kind will never be wholly absent. The American poet Edgar Lee Masters in his poem "Sexsmith the Dentist" in the famous Spoon River Anthology might have struck the right balance when he wrote

> "Why a moral truth is a hollow tooth
> Which must be propped with gold"

Education is an important pointer in Australian custody law because of the structure of the legislation. It is first provided in s.61(1) of the Family Law Act 1975 that, "subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child." The terms guardianship and custody mentioned in s.61(1) are defined in s.60A of the Act. Section 60A(1) states that,

> "A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to that child, all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than –
> (a) the right to have the daily care and control of the child; and
> (b) the right and responsiblity to make decisions concerning the daily care and control of the child."

and s.60A(2) conversely provides that,

> "A person who has or is granted custody of a child under this Act has –
> (a) the right to have the daily care and

control of the child;
and

(b) the right and responsibility to make decisions concerning the daily care and control of the child."

It should be noted that the presumption of joint custody, even subject to the substantial proviso of existing court orders, has been differently regarded by commentators (Bates; Lehmann).

The structure of the legislation leaves the matter of education somewhat in the air: it clearly involves both the long term welfare of the children and their daily care and control. It is quite clear, from the English Court of Appeal's decision in Re D.J.M.S. (A Minor) [1978] Q.B. 120, that the law will intervene where a parent, from whatever motive, will not send a child to school at all. On the kind of education and who decides what it will be is uncertain. The same is true of United States law as represented by recent cases. First, in Burchell v. Burchell 10 Fam. L.R. 1670 (1984), the Kentucky Court of Appeals held, by a majority, that a parent who has physical custody of the child during the school year may not unilaterally decide where the child will attend school where an initial agreement for joint custody had been entered into. Miller J., in the majority, stated (at p.1670) that, in such circumstances, "...major decisions affecting the children must be made in concert...". Miller J. continued by saying that, "If ... the parties to a joint custody agreement are unable to agree on a major issue concerning their child's upbringing, the trial court, with its continuing jurisdiction over custody matters, must conduct a hearing to evaluate the circumstances and resolve the issue according to the child's best interests". However, this judge did not pass an opinion on the present dispute as to whether the child should attend a state school or a church school. Gudgel J. dissented, but (at p.1671) directed his criticism at the initial joint custody agreement, which he considered to have been unworkable from the outset and, accordingly not in the child's best interest. Burchell is of interest because, quite apart from the issue of education considerable claims have been made in support of joint custody in American legal literature (Folberg; Bratt; Robinson). Much, of course, will depend upon the legislation governing custody awards: in Colorado it is provided (CRS para. 14-10-130 (1)) that,

> "Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court, after hearing and upon motion by the noncustodial parent, finds that, in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired."

In Griffin v. Griffin 11 Fam. L.R. 1355 (1985), the parties had agreed that the mother would have physical custody of the child, but that the child's schools would be selected by both parents. Inevitably, a dispute arose. Dubofsky J. of the Colorado Supreme Court held that the agreement was unenforceable. "Determinations affecting the custody and welfare of children", the judge said (at p.1355), "must always be made in accordance with the best interest of the child. The validity of agreements concerning custody and upbringing of children must be judged against this standard. Both the legislature and courts have recognized that child custody arrangements that promote discord between the parents are not in the best interests of the child." Further, the court was not in a position to enforce the agreement by substituting its choice of schools for that of the parents; the court, as a stranger to both child and parents, was ill-equipped to appreciate and implement the needs of the child.

The matter was complicated in Griffin, by the fact that parental choice was intertwined with considerations of religion: the father objected to the school chosen by the mother because it was associated with the Buddhist religion and would, therefore, take the child outside the mainstream of American life. However Dubofsky J. (at p.1356) commented that the father had not demonstrated any relation between the school's curriculm and any deleterious effect on the mental and physical health of the child. Thus, the court could only make a determination on the basis of the abstract propriety of the mother's sending the child to a Buddhist school, which course of action would be constitutionally improper.

Australia has tended to be rather fortunate with regard to the influence of religious belief on custody disputes as almost all the recent cases have involved Jehovah's Witnesses and the Exclusive Order of the Plymouth Brethren (Bates). Inevitably, in the United States, the courts have been faced with the altogether more exotic, including snake handling sects (Harris v. Harris 3 Fam. L.R. 2414 (1977)), an organization known as the First Community Church which taught an especially strict code of discipline as a method of gaining parental control of children. Enforced isolation, fasting and zealous beatings were encouraged by the sect as forms of discipline as were vile language towards, lying to, and shunning of non-believers and non-members of the Church (Hadeen v. Hadeen 7 Fam. L.R. 2051 (1981)) as well as the activities of "deprogrammers", who seek, often by using methods used by the cults themselves at the instigation of parents, to destroy the influence of extreme religious sects on children (Peterson v. Sorlien 7

Fam. L.R. 2054 (1981)). Although courts in Australia have not been faced with these instances, daily observation should tell us that many of the kinds of sect which proliferate in the United States are, at least, beginning to operate in Australia. The courts must not shirk the difficulties involved, and a useful pointer has been given in another recent Colorado decision: in In re Short 11 Fam. L.R. 1168 (1985), it was held, albeit rather cautiously, that parents' religious beliefs could be considered in custody proceedings. Nevertheless, the form in which the judgement was couched suggest that an objective appraisal of the effect of religious belief is required. Erickson, C.J. stated (at p.1169) that, "We hold that evidence of a party's religious beliefs or practices is relevant and admissible in a custody proceeding if it is shown that such beliefs or practices are reasonably likely to cause present or future harm to the physical or mental development of the child ... While evidence of endangering religious beliefs or practices may not be based upon mere conjecture, the evidence need not be restricted to actual present harm or impairment. Given the necessarily uncertain nature of psychological evaluation and diagnosis and the potential for future psychological impairment to result from practices that do not have present demonstrable effects upon the child, we conclude that evidence of beliefs or practices that are reasonably likely to cause present or future harm to a child is admissible in a custody hearing."

The Chief Justice concluded his judgement by reiterating the established principle (in Australian law, see Strum v. Strum (1969) 14 F.L.R. 284) that the courts would not attempt to distinguish between religious groups or make value judgements regarding the spiritual beliefs of particular groups. However, if a properly objective appraisal of the effect of religious upbringing on a child is to be undertaken by the courts, it may, in practice, be hard and, indeed, undesirable for them not to do precisely that.

Religion is, of course, like law itself, and art and music, a part of any country's cultural tradition (Glendon, Gordon and Osakwe). In the recent case of In the Marriage of Goudge (1984) F.L.C. 91-534 at p.79, 319, in a dissenting judgement, Evatt C.J. made a telling comment regarding Australian Aboriginal culture, which was, "... not to be seen as the remnants of a vanishing culture which will be obliterated in time by a process of assimilation. On the contrary they are to be seen as important in regard to the sense of identity and development of these children, as part of their links to an Aboriginal culture and heritage which has come to them through their mother's culture." Despite the fact that the Chief Judge's view did not prevail and that the whole decision has been subject to criticism (Chisholm) on the grounds that none of the judges had adequately addressed the real issues and had necessarily, albeit subconsciously, applied cultural values, Evatt C.J.'s statement is important in that it represents an awareness of a group's own cultural awareness. Quite apart from issues of land rights (see, for example, R. v. Toohey; Ex parte A-G (N.T.) (1979) 28 A.L.R. 27), matters relating to relics are assuming importance (see, for example, Onus v. Alcoa of Australia Ltd. (1981) 36 A.L.R. 425) and Tasmanian Aborigines are presently seeking the return of various relics and artifacts from institutions in Europe. Inevitably, matters of native peoples' cultural background have impinged on custody disputes.

In the United States, disputes relating to cultural matters in this context are regulated by the federal Indian Child Welfare Act 1978, which prescribes procedures and standards in cases involving foster care or termination of parental rights in cases involving native American children. In the Congressional statement of policy to be found in the legislation, the reasons for the enactment are set out as follows: "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." As a result of these minimum federal standards, it is provided, first, that, "Any party seeking to effect a foster care placement of or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." (25 U.S.C. 1912 (d)). Second, it is provided that, "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. 1912 (e)). Finally, the legislation specifies that, "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. 1912 (f)). Legislation of this kind has been urged by Chisholm (above) and has been attempted in the Australian Northern Territory. There, it is first provided, in s.68 of the Community Welfare Act, 1983, that, "The Minister shall provide such support and assistance to Aboriginal communities and organizations as he thinks fit in order to develop their efforts in respect of the welfare of Aboriginal families and children, including the promotion of the training and employment of Aboriginal welfare workers." Section 69 goes on to deal with Aboriginal children in need of care, and the Minister is required to ensure that every effort is made to arrange appropriate custody within the child's extended family. (s.69(a)). Where such custody cannot be arranged to the Minister's satisfaction, he must make every effort to arrange appropriate custody of the child by Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law (s.69(b)). If neither variety of custody cannot be arranged without undergoing the welfare of the child, (s.69(c)) "... after consultation [with]

(i) the child's parents and other persons with responsibility for the welfare of the child in accordance with Aboriginal customary law; and
(ii) such Aboriginal welfare organizations as are appropriate in the case of the particular child,

a placement that is consistent with the best interests and the welfare of the child shall be arranged taking into consideration –

(iii) preference for custody of the child by Aboriginal persons who are suitable in the opinion of the Minister;
(iv) placement of the child in geographical proximity to the family or other relatives of the child who have an interest in, and responsibility for, the welfare of the child; and
(v) undertakings by the persons having the custody of the child to encourage and facilitate the maintenance of contact between the child and its own kin and with its own culture.

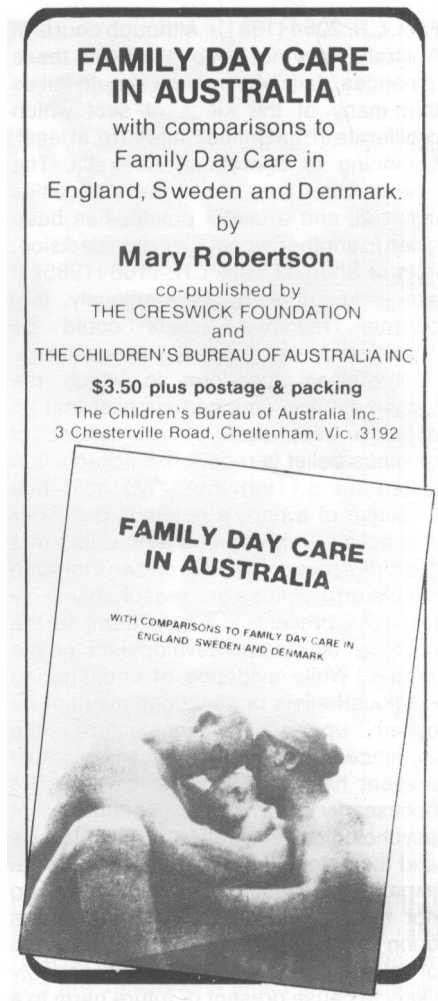
Lest it be thought that this issue is too removed from the experience of social workers, it should be borne in mind that, in Goudge, detailed expert evidence had been given by a field officer with Aboriginal Legal Aid regarding extended family links and to the view that children who knew that they were of Aboriginal descent did have difficulty growing up in white society.

3. Social Security Law

There can be no area of the law where social workers can exercise a more effective influence that in the area of social security law: they, unfortunately perhaps, come into contact with the legislation far more frequently and directly than do most lawyers. Although one commentator (Sackville) has commented, perhaps more optimistically than realistically, that, as family lawyers become more involved with the Social Security Act, anomalies and omissions will become increasingly exposed. But there can be no doubt whatsoever that anomalies and omissions do occur, and a few examples will demonstrate the dangers of legislation which does not, as Mendelsohn has strongly pointed out, have an effective policy base and which is also subject to piecemeal and ad hoc amendment.

In some ways, the most important of the particular benefits available under the Social Security Act is the invalid pension – thus, in the months of February to May 1985, there were 60 applications for review by the Administrative Appeals Tribunal, whilst, the next greatest number of applications in the same period was fifteen in the cases of both unemployment benefit and handicapped child's allowance. It is provided, in s.24(1) of the Social Security Act that a resident of Australia, currently residing in the country, over the age of 16 and not in receipt of an age pension, is qualified to receive an invalid pension if, ".. (a) is permanently incapacitated for work or is permanently blind...". The term "permanent incapacity" is defined in s.23 as being not less that 85% of permanent incapacity. The distincition between the categories of permanent incapacity and blindness is important for practical purposes because, by reason of 2.38(2) of the Act, an income that is applied to invalid pensions, except, by reason of s.28(2AA), in the case of a person who qualifies on the basis of permanent blindness. The two cases of Leach v. D.G.S.S. [1983] S.S.R. 135 and Touhane v. D.G.S.S. [1984] S.S.R. 239 well illustrate the unfortunate consequences of these provisions. In the former case, the applicant, who was aged 61 and had worked as an accountant for many years, claimed an invalid pension on the ground of permanent blindness. Evidence showed that he had a loss of 60% visual efficiency and the Department of Social Security had refused him a pension on that ground, but had intimated that he would be granted a benefit on the basis of 85% permanent incapacity for work. The Administrative Appeals Tribunal (Mr. Clarkson) affirmed the Department's decision and held that, to fulfill that statutory criteria, a person would need to be, "... wholly blind as opposed to partially blind..." and it involved, for adjudicative bodies, "... a purely physical assessment of a bodily sense without reference to ... other factors." (In the case of pensions awarded on the basis of 85% permanent incapacity factors such as age, physical and mental capacity, education, linguistic competence and marketability of skills could be taken into account; see Ilich v. D.G.S.S [1983] S.S.R. 134). However, in Touhane, a differently constituted tribunal (Messrs. McMahon, McLelland and Howell) took a completely different view of "blindness" in the legislation. First, they stated (at p.239) that the word "blind" was, "... a curiously imprecise and old fashioned word (rather like "mad") seldom used by medical practitioners and principally to be found in non-medical contexts. It more properly belongs in the realm of literature, religion or history than in medicine or law. It is, however, a word used in an Act of Parliament and one must, therefore, ascribe a meaning to it." The Tribunal rejected the approach used earlier in Leach on the grounds that it ignored medical practice and the standards adopted by people who were professionally concerned with visual deficiencies. The Tribunal then questioned the policy of retaining blindness as an independent ground for the award of an invalid pension, but, were it to be retained, it should be legislatively defined, and such definition should be based on, "... modern opthalmological practice and not be circumscribed by literary, dictionary or antique meanings". It is hard not to agree strongly with the Tribunal in Touhane: it is also hard to escape the conclusion that the reason why blindness is treated separately from the other ground for the award of the benefit (which are frequently a combination of lumbar injury and psychiatric problems; see, for example, Leone v. D.G.S.S. [1982] S.S.R. 57), is because it is capable of quantification. It appeared from Touhane that the Department were using a quite arbitrary test of requiring that a claimant's visual acuity be less than 6/60 – despite the statement by the Tribunal (Mr. Hall) in McGeary v. D.G.S.S. [1983] S.S.R. 112 at p.113 that the concept of 85% incapacity is, "... best understood in qualitative rather than quantitative terms."

A key factor in all social security adjudications is that, as with those mentioned on invalid pensions, the grant or refusal of a benefit will almost certainly affect, perhaps to a very significant degree, the lives of the claimant's family. This fact was recognised by the Administrative Appeals Tribunal (Mr. Hall) in McGeary v. D.G.S.S. [1983] S.S.R. 112, where it was regarded as unreasonable to require the applicant to move from Ballarat to Melbourne with his wife and three children as housing costs would be significantly higher and where there was, "... absolutely no assurance of finding



work ..." There are many benefits, however, which are directly concerned with family support and deficiencies in the law, as represented by Leach and Touhane (above) are likewise present. The most spectacular failure in this area occurs in relation to handicapped child's allowance, where the structure of the legislation has been the subject of considerable criticism by the Administrative Appeals Tribunal (below). Eligibility to receive a handicapped child's allowance arises in two situations: first, in respect of a "severely handicapped child", who is defined in s.105H(1) of the Social Security Act as a child who has a physical or mental disability and by reason of which is in need of constant care and attention and is likely to need such care and attention permanently or for an extended period. The second category refers to "handicapped" children: s.105JA of the Social Security Act provides that an allowance is payable if the Director-General is satisfied that the applicant provided care and attention, only marginally less than the care and attention needed by a severely handicapped child, and that the applicant was suffering severe financial hardship. The bizarre result of these provisions, notably the use of the word "marginally" have been noted by the

Tribunal (Messrs. Todd, Marsh and Tickle) in Yousef v. D.G.S.S. (1981) 4 A.D.L. 317 at p.319 who state that their result is that, "... a wealthy person who has a severely handicapped child faces no kind of means test, but a person who has a child needing only marginally less care and attention than that needed by a severely handicapped child has to be subjected to severe financial hardship to be eligible at all, and is then still required by the legislation to face the test of the director-general's discretion as to whether the full [amount] per month should be paid. We would not ordinarily make such a comment, but in this case we feel entitled to question whether the intention of the legislation is really reflected in these provisions." The Tribunal concluded (at p.321) that, "... how much more sensible it would seem to have only one form of handicapped child's allowance, and to have one form of means test applied to. In social terms, such a test would necessarily have not to exclude from entitlement to the benefit in question a family of slender means in which the mother has been prevented from working by being required to stay home because of a disabled child for her care and attention. For such a family to carry on without the earnings of a working mother must be hard indeed."

Again, were the word "constant" as used in the legislation to be literally intepreted, it would preclude a parent from seeking to ameliorate the child's condition by sending her or him to a special school and, indeed, it was so held (Meloury v. D.G.S.S. [1983] S.S.R. 126). However, in two later cases (Shingles v. D.G.S.S. [1984] S.S.R. 230 and Seager v. D.G.S.S. [1984] S.S.R. 230), the Administrative Appeals Tribunal have mitigated the unreasonableness of that earlier decision, although it is clear from those decisions that the Tribunal had to use rather obvious legal circumlocutions to arrive at a sensible decision! Mention of those decisions takes us back to Touhane (above), where the Tribunal granted the applicant the benefit she sought for, although it was clear that the applicant fulfilled the arbitrary medical test (above) for blindness, she had had an operation to remove cataracts in Iran when she was two years old and, after her arrival in Australia at the age of eleven, she was found to have glaucoma. It is provided in s.25(1) of the Act that an invalid pension shall not be granted to a person unless the person became permanently blind "while in Australia or during a temporary absence from Australia". Having considered the evidence, the Tribunal considered it, "more likely than not" (see McDonald v. D.G.S.S. (1984) AASC 92-000) that she had become permanently blind whilst in Australia. The Tribunal also noted that an early medical examination which she had undergone in Australia had been hampered by difficulties of communication. These difficulties and, perhaps, the condition itself could well have been exacerbated by extraneous factors: the applicant was originally Iranian which strongly suggests a fairly rigorous Islamic upbringing which, together with her handicap, could well have resulted in her effective isolation. Thus, despite the view expressed in Leach (above) that cultural and other factors were irrelevant in cases involving permanent blindness, the Tribunal might well have not regarded them as wholly irrelevant.

The impending legal problem for social workers lies in the indubitable fact that the legislation as a whole is in need of extensive review. The areas discussed in this paper are essentially illustrative and social workers could doubtless produce other examples which reinforce that view – thus, particular criticism has been directed (Partington) at procedures attaching to late applications for particular benefits. Social workers should be particularly vigilant in relation to the way in which the legislation operates on a daily basis. Of course reform of particular benefits is possible on an ad hoc basis, but the abuse leading to such reform seems to be required to be fairly gross: thus, in W. v. D.G.S.S. [1983] S.S.R. 141, the applicant has obtained an order, in favour of herself along, (such orders are normally made only in "exceptional circumstances"; see, for example, Adoption of Children Act 1964 (Vic. s.10(a)), to adopt a particular child. The reasons for allowing that order were that the applicant had been trained as a mothercraft nurse, that she had a particularly close attachment to the child, that the child had been born with a condition which had affected her physical and intellectual development and that the applicant had worked at the hospital where the child had been born, so having experience with handicapped people. Subsequently, the applicant gave up her paid employment and applied for supporting parent's benefit, a claim which was eventually dismissed by the Administrative Appeals Tribunal. The applicant's substantive hurdle was the provision in the Social Security Act s.83AAA(1) that, in order to qualify for the benefit, the child must have been, "... born to that woman...". The Tribunal refused to equate adopted with natural children for all legal purposes. This decision almost certainly caused the definition of "supporting parent" to be quickly amended (Social Security Amendment Act

1983 s.18) so as to remove that qualification by W remains disturbing because the special kind of relationship which so clearly existed between the child and the applicant and, perhaps more important, the needs of the child were not taken into account. Instead, W was reduced to a sterile exercise in statutory interpretation.

4. Mental Health

As regards this important matter, McClean has encapsulated the problem well: "There is little need to spell out the manifold problems presented by mental illness. Like any other illness, it may lose a man his livelihood; like a prison sentence, it may deprive him of his liberty, with unhappy consequences for his family. The very nature of the illness may handicap him in the normal business of communicating with others, taking decisions and managing daily affairs; and the patient and his family may have to cope with guilt, fear and misunderstanding." The iconoclostic psychiatrist Szasz has, further, designated claims that mental health law is concerned with the rights and health of patients as, "...brazen falsehoods" and has stated that, "... the primary concern of any mental hygiene law is to empower physicians to imprison innocent citizens and impose ostensibly medical interventions on them against their will." These statements may, as McClean himself has said, be extreme but they must be considered in the light of present and impending problems. In relation to the legal implications of mental health, the social worker is faced with three views of insanity: the clinical (as defined by the specialist in psychological medicine), the colloquial (as observed by lay people) or legal (as defined in various statutes and cases) (Williams). Indubitably, many of the definitions and descriptions in legislation are value ridden or imprecise: thus, in Tasmania, s.4(5) of the Mental Health Act 1963 provides that, "Nothing in this section shall be construed as implying that a person may be dealt with under this Act as suffering from mental disorder, or from any form of mental disorder described in this section, by reason only of promiscuity or other immoral conduct." The aim of that provision is apparent (McClean) – that is, to protect individuals from unjustifiable labelling – but one cannot easily escape the pejorative expressions "promiscuity" and "other immoral conduct".

Yet that is not the end of the matter, but in the state of Victoria at any rate, only the beginning. There, the Mental Health Bill 1985, received its second reading in May 1985 and in now lying on the table for public comment until the Spring session of Parliament. Richards has said of the Bill, "... dissection and criticism of [it] by civil libertarians is crucial. Past and present psychiatric patients are rendered powerless by the lack of an articulate and united representative voice. In the absence of critical and informed public opinion, governments will continue to accord mental health a low priority."

The first characteristic of the Bill is that nowhere does it attempt to define "mental illness". Instead, it sets up (cl.8) a number of criteria which must be found to apply to a person if she or he is to be admitted to and detained in a psychiatric institution. At least the Tasmanian Mental Health Act s.4 attempts to define terms such as "mental disorder", "subnormality" and "psychopathic disorder". In the proposed Victorian legislation, the first of the proposed criteria is that, "... the person appears to be mentally ill"; where the consequences of a finding of mental illness are as severe as they are it is surely unthinkable that the criteria should be as imprecise as is that. Just as unsatisfactory is a third criterion that, "... the person should be admitted to and detained as an involuntary patient for that person's health or safety or for the protection of members of the public." Here again, the criterion is far too open ended and, additionally, confuses considerations which ought to be the province of the criminal law with issues more specifically concerned with mental health. Further, the procedures in respect of admission to psychiatric services are unsatisfactory since, at no stage, does the Bill permit intervention by an independent psychiatrist, advocate or representative of the person who is sought to be detained – the contract with the ordinary processes of the criminal law will be apparent.

The indiscriminate confusion between criminal law and mental health considerations is still further emphasised by cl.10, which gives police officers power to apprehend, and immediately bring before a medical practitioner, a person who appears to be mentally ill, if the police office has reasonable grounds for believing that the person has recently attempted or is likely by act or neglect to attempt suicide or serious bodily harm to himself or herself; is committing or has recently committed an offence and admission to a psychiatric service would be beneficial; or is likely to commit an offence against the law. This provision, particularly when taken together with cl.8, can only be described as bizarre: police officers, whatever their actual skills may be, are not qualified to make the assessment of whether someone, "... appears to be mentally ill" and the ambit of their powers is clearly too wide – thus, people whose crimes are minor, such as vagrancy, may be liable to apprehension under cl.10.

Of course the Bill is not all bad (it would be remarkable were it so): cls. 4(2), 5 and 6 propose the creation of community-based services which offer specialist support, advice, information and/or care to the mentally ill outside admission to psychiatric services. Such services do not presently exist in Victoria and ought to be encouraged, by government, both morally and financially. When the services are established, authorised psychiatrists must exercise their power, duty or discretion to make an observation or detention order subject to the overriding consideration that, "... persons who are mentally ill receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given".

Should this proposed legislation become law as it stands, groups and individuals (including social workers) must exercise continuous vigilance so that the possible abuses which have been mentioned are avoided. The Bill is also important in relation to the general comments of Glendon, Gordon and Osakwe (above) that law is as much a reflection of social and cultural values as literature and music: the way in which the law and legal agencies regard and treat the less privileged and fortunate members of society is, indeed, illustrative of the values exposed by society at large.

5. Conclusion

This discussion is, of course, not intended to be comprehensive. For instance, the role of social workers in relation to the law has probably never been subjected to more scrutiny. In England, there has been another case, Jasmin Beckford which bears an abject resemblance to Maria Colwell (Stone) and where criticisms have

been both of social workers involved in the case and of social work practice. In the United States, the relationship between social worker and client has recently been the subject of a decision of the Illinois Appeals Court in Horak v. Biris 11 Fam. L.R. 1236 (1985). In that case, social work malpractice was held to be an independent and actionable tort in a case where a marriage counsellor had sexual relations with the plaintiff's wife during marital counselling. Hopf J. considered (at p.1236) that, "... the very nature of the therapist-patient relationship, which was alleged and admitted here, gives rise to a clear duty on the therapist's part to engage only in activity or conduct which is calculated to improve the patient's mental or emotional well-being, and to refrain from any activity or conduct which carries with it a foreseeable and unreasonable risk of mental or emotional harm to the patient." However, the judge went on to say (at p.1237) that the field of practice which the defendant pursued was more closely related to psychology rather than social work as those terms were employed in the relevant statutes (Ill. Rev. Stats. 1979, Ch.11, paras. 5304 and 6302) and because of , "... apparent overlapping of these two fields, we think proofs may well reveal that the defendant possessed or should have possessed a basic knowledge of fundamental psychological principles which routinely come into play during marriage and family counselling. The "transference phenomenon" is apparently one such principle, and has been defined in psychiatric practice as "a phenomenon ... by which the patient transfers feelings towards everyone else to the doctor, who then must act with a proper response, the counter transference, in order to avoid emotional involvement and assist the patient in overcoming problems. "... The mishandling of this phenomenon, which generally results in sexual relations or involvement between the psychiatrist or therapist and the patient, has uniformly been considered as malpractice or gross negligence in other jurisdictions, whether the sexual relations were prescribed by the doctor as part of the therapy, or occurred outside the scope of treatment." Hopf J. concluded (at p.1237) his judgement by stating that some areas of social work activity, "... (i.e., community organization for social welfare, social work research, social welfare administration) may not readily lend themselves to a malpractice action, we believe that marriage and family counselling is one area of social work likely to possess more well-defined principles of social work practice because of its close association wth the field of psychology." Taken together with various earlier cases (Bates), Horak v. Biris strongly suggests that social workers should take care to analyse their relationships both with clients and employers. The action in that case was brought against the counsellor personally, although it is not clear from the report as to whether the defendant was self-employed or was employed by another body or person. Most actions likely to be brought in respect of torts committed by social workers are, as in the case of teachers, likely to be brought against their employers (Introvigne v. Commonwealth (1980) 32 A.L.R. 251), but it may well be that in cases such as the admittedly exotic Horak v. Biris the social worker's conduct falls drastically outside her or his sphere of employment. Much will, inevitably, depend on the precise contractual relationship involved, but increasing care ought to be exercised, particularly in the social security area (Bates et al).

However, it would be wrong to conclude on a pessimistic note; there is evidence that, in one Australian legal jurisdiction at any rate, the value of social workers' observations is high. In the case of In the Marriage of Hague and Haines (1977) F.L.C. 90-259 at p.76, 386, Wood J. of the Family Court of Australia said that, he, personally, found that reports made by welfare officers, either those employed by the court of be accredited outside agencies, extremely valuable since they were able to place before the court matters which it would otherwise be extremely difficult to introduce into evidence. "I hope", his Honour continued, "I am not being unduly optimistic in expressing the view that in due course the legal profession itself will come to realise the value of reports of this kind and be less prone to take exception to them on the basis that they contain inadmissable and arguable expressions of opinion". Elsewhere, I have expressed the hope tht the disciplines of social work and law are gaining respect for one another. It must not be permitted merely to be a hope: the quality of life and perhaps even life itself may be at stake for too many people otherwise.

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