

SOCIAL SECURITY AND WELFARE SERVICES FOR RETARDED PEOPLE: THE STATE OF THE ART

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[In this article Mr Carney investigates the complex pattern of welfare services and income security arrangements for retarded people. He examines some of the areas where the deficiencies and anomalies in the law require radical statutory reform — such as the provision of straightforward criteria for the identification of a retarded person and the need for positive legislative discrimination. The author concludes however that the problems of retarded people are finally only partially amenable to legal solution, and that the activity of the law in this context should be directed towards the provision of a supportive system for the integration of this group into the community.]

Throughout history, society has treated handicapped people as outcasts or as objects of pity, but attitudes are now changing. Advances in medical and social research have created a surge of general optimism about human disabilities. It is now possible to overcome many of the social consequences. Thinking on human rights has led to international recognition that handicapped people should be accorded the same status and treatment as the rest of society. Yet our evidence indicates that the treatment of handicapped people in Australia still leaves much to be desired. . . .†

I INTRODUCTION

A The nature and scope of the problem

Mental retardation cannot be defined solely in terms of comparatively permanent measures of intelligence or abilities.¹ The classification is heterogeneous in character, for individuals within it differ quite markedly from each other in their needs and capacities, which themselves may alter with the passage of time, either through natural causes or in response to properly directed educational or other programmes.² The legal problems of a retarded person will therefore depend not only on the nature of his contact or dealings with the community but also on the capacity of the person at the time of those transactions, for as the report of the Inquiry into Poverty pointed out, 'handicapped people form a group with considerable internal diversity'.³

† Australia, *Royal Commission on Human Relationships: Final Report* (1977) Volume 5, 114, para. 1.

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¹ Dybwad G., 'Basic Legal Aspects and Provision for Medical, Educational, Social and Vocational Help to the Mentally Retarded' (1972) 2 *Australian Journal of Mental Retardation* 97,100; Woody R. H., *Legal Aspects of Mental Retardation: a Search for Reliability* (1974) 10-5.

² Dybwad, *loc. cit.*; Woody, *op. cit.* 21-2.

³ Australia, Commission of Inquiry into Poverty, *First Main Report, Poverty in Australia* (1975) 282 (hereafter cited as the *Henderson Report*).

The more detailed examination conducted for the Commission of Inquiry into Poverty by the Reverend Martin, the Commissioner responsible for social and medical aspects of poverty, underlined the fact that mental retardation is a complex and diverse area which

encompasses a host of mental disabilities of varying degree for people of all age groups. There are specific problems identifiable for each sub-category classified according to criteria of age, degree and type of disability.⁴

In 1975 the report of the Committee of Inquiry into Hospital and Health Services in Victoria⁵ adopted what it described as a 'broad classification' of the degree of retardation as measured by standard tests of intelligence⁶ (an approach which has been criticized on several grounds⁷) to produce four sub-groupings which were then related to the existing pattern of services or needs for each group. The first group, the 'mildly retarded', were defined by reference to intelligence quotient (I.Q.) scores of 50 to 65 points; they were followed by the 'moderately retarded' (I.Q. scores of 30-50), the 'severely' (I.Q. 20-30) and finally the 'profoundly' retarded (I.Q. below 20). Each sub-group includes both children and adults, with the largest proportion concentrated in the mildly retarded category and the smallest in the last two categories.⁸ For the mildly retarded the report suggested that the normal pattern would be for the child to be educated in one of the 22 special schools run by the Education Department and then to enter ordinary open employment. A few cases would require sheltered employment and provision should also be made for hostels to accommodate people seeking independence or following the death of their parents, but otherwise no special provisions would be necessary. The moderately retarded children were expected to receive their education in day training centres followed, as the normal pattern, by employment in a sheltered workshop. Supportive services to families and alternative forms of care in foster and family group homes or in hostels were also recommended.⁹

People in the last two sub-categories were classified as individuals 'quite incapable of independent existence [who] require care and supervision for the duration of their lives'.¹⁰ It was estimated that, while roughly one per cent of the population satisfy one of these definitions of retardation, only one in ten of the retarded (or 0.1 per cent of the population) require this

⁴ Australia, Commission of Inquiry into Poverty, Third Main Report, *Social/Medical Aspects of Poverty in Australia* (1976) 52 (hereafter cited as the *Martin Report*).

⁵ Victoria, *Report of the Committee of Inquiry into Hospital and Health Services in Victoria* (1975) (hereafter cited as the *Syme Townsend Report*).

⁶ For an introduction to the orthodox concepts and instruments for measuring individual differences in intelligence see Tyler L. E., *The Psychology of Human Differences* (3rd ed. 1965) 61-99.

⁷ *Supra* 19 n. 2.

⁸ *Syme Townsend Report, op. cit.* Appendix 14, 297. See also Tyler, *op. cit.* 365-88.

⁹ *Syme Townsend Report, loc. cit.*

¹⁰ *Ibid.*

constant care. Consequently, only this group should be considered for residential facilities operated by the Mental Health Authority. Indeed, some commentators argue that even this figure — which in administrative terms leads to a recommendation that 1.3 beds be provided per thousand of the general population¹¹ — is too high.

B The areas of need

The report by Commissioner Martin sought to bring some order to this diverse picture, contending that:

there are several general areas of concern for the majority of intellectually retarded people and their families. These areas are residential care, daytime activity, financial situation and family problems in caring for retarded people.¹²

Under the head of residential care, the major concerns arise with respect to the adequacy of the overall level of provision of services; the degree of localization of the administration of services and the degree of equity in the distribution of services between regions; the adequacy of the criteria governing admission (and the consequential matching or mismatching of people to facilities), the standards of residential care, the regularity and adequacy of reviews of the status of people in residential facilities; the consequences of residential care and the provisions for transition from residential to non-residential programmes. By contrast, the major issues which arise under the other heads relate to the more familiar questions of access to education and work training programmes; possible geographic imbalance of facilities due to funding arrangements which tie public sector contributions to the level of private funds raised locally; adequacy of social security entitlements and the problems involved in planning and managing the private lives and financial affairs of retarded people. These issues are discussed below by reference to the Victorian and Commonwealth legislation and practice.

C The role and function of the law

The full range of civil (including welfare) and criminal law is potentially capable of coming into play with respect to the retarded person. Both case law and statutory provisions might be applicable. So far as the common law is concerned the basic proposition is that the rules of law otherwise relevant in the case of the non-retarded citizen continue to apply to the retarded person unless it can be demonstrated that the person lacks the requisite degree of legal capacity.¹³ Statutory provisions might qualify or vary this position. In Victoria the obvious examples are the provisions of the Mental

¹¹ *Ibid.*

¹² *Martin Report, op. cit.* 52.

¹³ United Kingdom, *Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency 1954-1957* (1957) Cmnd 169, para. 844 (hereafter cited as *British Royal Commission*). For a review of the general law, other than in the social security and welfare areas, see Carney T., 'Enquiry into Mental Retardation: Report on the Law' in Victoria, *Report of the Victorian Committee on Mental Retardation* (1977) 151-68.

Health Act 1959 which govern admission to, and treatment in, training facilities¹⁴ and the provisions of the Education Act 1958 relating to special education.¹⁵ With the declining popularity of permanent institutionalization of the retarded and the shift towards the substitution of community-based 'normalization'¹⁶ programmes, the retarded child has increasingly been put into situations which highlight the deficiencies of the law. Not least of the reasons for the inadequacy of the law is the difficulty of finding simple pragmatic tests for identifying a retarded child, plus a reluctance by the legislature to enact provisions which positively discriminate in favour of the retarded and a failure of the political processes to make a sufficient allocation of funds to those programmes and services which have been established.

It is contended in this article that a policy of normalization can only be achieved by adopting a reasonably radical approach. An essential part of that solution as outlined below should involve a recasting of the definition of retardation away from objectively framed general propositions in the direction of a definition focused on the individual and incorporating the notion of developmental potential. In addition, there should be some real commitment to providing the necessary means for each individual to participate — within the limits of his developmental potential — in society on a normal footing. Advocacy or welfare rights strategies such as those recommended by Dybwad¹⁷ and the proposals of the British Columbia Royal Commission for the enactment of legislation specifying the fundamental rights of the retarded child and providing for the right to seek the legal remedy of the declaration from the courts in cases of non-compliance¹⁸ are two methods of substantially strengthening the position of the retarded child. These two strategies could be adopted in Victoria. In addition, very serious consideration should be given to complementing them by a section, to be written into each of the statutes providing services for the retarded, establishing an automatic 'indexed' allocation of funds to the various elements of programmes.¹⁹

II STATE GOVERNMENT PROGRAMMES FOR THE RETARDED

Assistance for the retarded person in Victoria is provided at the State and Commonwealth level. At the State level a limited form of domiciliary

¹⁴ Mental Health Act 1959, Part II, Division 3 and Part III.

¹⁵ As amended by the Education (Handicapped Children) Act 1973.

¹⁶ The concept of normalization has been accepted as Victorian government policy: Victoria, *Parliamentary Debates*, Legislative Council, 6 April 1977, 7307 (second reading speech on the Health Commission Bill by the Minister for Health).

¹⁷ Dybwad, *op. cit.* 104.

¹⁸ British Columbia, Royal Commission on Family and Children's Law, Fifth Report, *Children and the Law* (1975) Part III (hereafter cited as 'Children's Rights'); Part IV (hereafter cited as 'Special Needs of Special Children').

¹⁹ 'Special Needs of Special Children', *op. cit.* 19. This suggestion is similar to the provisions written into the federal Social Services Act to provide for the automatic updating of the levels of pensions and benefits: Social Services Act 1947 (Cth), ss. 28A, 112AA.

support for the retarded person living in an ordinary domestic setting is now available through a government scheme to meet the full cost of 'home help' services. The scheme was introduced on a pilot basis in 1972 and has since attracted widespread support from local government authorities who bear the responsibility for the delivery of the service.²⁰ For the retarded person of limited means and advancing years who suffers a mild degree of handicap the State government has recently introduced controls over the more blatant forms of exploitation through sub-standard accommodation provided in boarding houses dressed up as 'rest homes'. These controls were primarily directed against facilities catering for the aged and the physically handicapped²¹ but, although the impact of the legislation has not been spectacular, there have been some indirect benefits for the retarded.²²

The major contribution by the State government towards retarded people however still comes in the form of institutional residential accommodation for the more severely retarded individuals and day centres to cater for some of the educational, cultural and recreational needs of people — mainly children — caught in the limbo between institutional-based care and domiciliary care in the community. This is supplemented by responsibilities assumed by the State for the provision of educational services to children under 16 following the passage of legislation in 1973.²³ In an administrative sense these services are shaped and controlled by the provisions of the Mental Health Act which enable the government to operate residential facilities²⁴ and to register and subsidize the day training centres.²⁵ Ultimate legal and political responsibility has however now been transferred to the newly established Health Commission.²⁶ The statistical picture of these services is rather more complex but it can be summarized reasonably concisely. Residential accommodation is predominantly a governmental responsibility (apart from four small religious facilities)²⁷ which is currently discharged by the operation of eight

²⁰ A pilot scheme was introduced in 1972-3 and soon extended to all municipalities. As at June 1974 19 municipalities had participated, providing 3,023 hours of assistance to the retarded at a total cost to the taxpayer of \$2,900: *Syme Townsend Report, op. cit.* Appendix 11, 238. On the latest available figures 64 cities, 6 towns, 6 boroughs and 93 shires were participating in the scheme: Victoria, *Parliamentary Debates, Legislative Assembly*, 4 October 1977, 9901.

²¹ Health Act 1958, ss. 220A, 220B, 220F. The latest report of the Commission of Public Health, which is charged with the administration of these controls, discloses that there were 125 registered special accommodation houses with 70 applications under consideration as at 30 June 1976. Four applications had been rejected: Victoria, *Report of the Commission of Public Health — 30 June 1976 (1976)* 43.

²² *Ibid.*

²³ Education (Handicapped Children) Act 1973.

²⁴ Mental Health Act 1959, Part II, Division 1.

²⁵ Part II, Division 3.

²⁶ Health Commission Act 1977, ss. 7(2)(a), 7(3).

²⁷ Woodbine Centre (Warracknabeal), Marillac House (East Brighton), St. John of God Rural Centre 'Yarra View' (Lilydale), Churinga (Greensborough): *Syme Townsend Report, op. cit.* Appendix 14, 299. Funding is on a deficit basis costing a total of \$283,000: Victoria, *Parliamentary Debates, Legislative Council*, 6 April 1977, 7306.

residential training centres with a combined bed capacity of around 3,450 people.²⁸ Educational programmes are organized for three of these institutions in the form of residential schools for the intellectually handicapped with a present total enrolment of 323.²⁹ The day training centre component comprises 71 approved non-government facilities catering for approximately 3,500 enrolments.³⁰ Responsibility for education in some of these centres has been transferred from the Mental Health Authority to the Education Department, which classifies them as 'special development schools'.³¹ All other retarded people — especially children — are absorbed in the wider community. Children in this position either attend ordinary schools or one of the 22 'special schools' designated by the Education Department.³²

A Residential training centres

The legal position of a retarded person in a residential training centre is determined by the provisions of the mental health legislation, which is expressed as extending to cover people described as 'intellectually defective' and which enables such people to be admitted as voluntary or involuntary ('recommended') patients. An intellectually defective person is defined in broad terms which place few constraints on those members of the medical profession charged by the legislation with the responsibility for making decisions on admission and discharge. Under the terms of the definition the legislation is applicable to any person 'suffering from an arrested or incomplete development of mind'.³³

Voluntary patients may be admitted on receipt of a request from the proposed patient or from his parent or guardian,³⁴ together with a certificate from a medical practitioner who has conducted a personal examination of the patient and formed an opinion that he is intellectually defective within the terms of the Act.³⁵ The institution is under no obligation to

²⁸ *Syme Townsend Report, op. cit.* Appendix 14, 294. The eight centres, together with bed capacities as at April 1975, are: Ararat Training Centre (393), Beechworth Training Centre (249), Janefield Training Centre (493), Kew Cottages Training Centre (940), Pleasant Creek Training Centre (207), Sunbury Training Centre (893), Warrnambool Training Centre (125), Kingsbury Training Centre (120): *ibid.* 297. The latest available report of the Mental Health Authority, covering the period to the end of 1975, shows a total of 3,450 people in these institutions: Victoria, *Report of the Mental Health Authority — 31 December 1975 (1976-77)* 26.

²⁹ The three are: Kew (64), Janefield (144), Pleasant Creek (115): Victoria, *Parliamentary Debates, Legislative Assembly*, 15 September 1977, 9627.

³⁰ Victoria, *Parliamentary Debates, Legislative Council*, 6 April 1977, 7306.

³¹ In June 1976 there were eight of these 'special development' schools: Victoria, *Report of the Ministry of Education and Special Education — June 1976 (1977)* 10. At the date of writing there were 15 of these schools catering for around 585 children: Education Department, Special Services Division, personal communication to author.

³² These schools catered for around 2,720 children at the date of writing: Department of Education, Special Services Division, personal communication to author.

³³ Mental Health Act 1959, s. 3.

³⁴ S. 41(2)(a) and (b). Where the person is under the age of 16 years only his parent or guardian has the capacity to make such a request: s. 41(1)(a).

³⁵ Ss. 41(2)(b) and 105.

admit such a patient³⁶ and once admitted he may be discharged on the order of the superintendent or the resident medical practitioner of the institution, on the order of the Chief Medical Officer or following an application in writing from the parent or guardian or the patient.³⁷ A voluntary patient may however be held for a period of up to three days after receipt of an application for discharge.³⁸ Recommended patients are admitted following an initiative taken by a third party accompanied by a recommendation from a medical practitioner who has personally examined the patient within the previous seven days.³⁹ The superintendent of the institution must examine the patient without delay⁴⁰ and either discharge him immediately, hold him for observation for not more than 21 days or record a medical opinion concurring with that of the first practitioner and on the basis of those two medical judgments hold the patient as an involuntary or 'recommended' patient.⁴¹ On the most recent of the published statistics 77 per cent of the patients in Victorian institutions for the mentally retarded were there as 'voluntary' or informal patients⁴² while 23 per cent had the status of 'recommended' patients.⁴³

As was pointed out by the British Royal Commission which reported two years prior to the enactment of the present Victorian legislation, the term 'intellectual defective' is not generally understood by the community and is the subject of disputation.⁴⁴ In short, it is not socially neutral in connotation or perceived by the community to be descriptively accurate.⁴⁵ The report of the Royal Commission went on to reject any statutory provisions similar to those contained in the present Victorian legislation which require a complete segregation between institutions (public or private) for the care of the mentally ill and those for the care of the retarded.⁴⁶ Instead, it was recommended that a neutral all-embracing term such as 'mental disorder' ought to be chosen as the universal definition and be qualified only in order to firmly establish the policy of confining the exercise of compulsory powers of admission to one of last resort.⁴⁷ This

³⁶ S. 41(7).

³⁷ S. 41(10).

³⁸ S. 41(4).

³⁹ S. 44(1).

⁴⁰ S. 44(2).

⁴¹ S. 44(3), (4) and (5).

⁴² Informal admissions need not conform to the requirements of the Mental Health Act, but such patients cannot be admitted to facilities gazetted under that legislation. There are three 'informal' training centres with a total of 255 beds: *Syme Townsend Report*, *op. cit.* Appendix 14, 291.

⁴³ *Ibid.* 293 (the figures are for the end of November 1973). In large part the numbers of 'recommended' patients probably reflect the legacy of *past* rates of entry for continuing patients rather than *present* entry points for new patients.

⁴⁴ *British Royal Commission*, *op. cit.* para. 184.

⁴⁵ These two attributes were regarded by a North American commentator as essential elements of a definition of retardation: Solberg M. P. *et al.*, 'North Carolina Guardianship Laws — The Need for Change' (1976) 54 *North Carolina Law Review* 389, 409.

⁴⁶ Mental Health Act 1959, ss. 25(2) and 32; *British Royal Commission*, *op. cit.* para. 185.

⁴⁷ *Ibid.* para. 186.

recommendation was written into the legislation and confirmed in the government White Paper on services for the retarded published in 1971.⁴⁸ Similar neutral language and policy should be adopted in Victoria.

The process of admission to facilities for the retarded raises some delicate questions concerning the protection of the civil rights of people against unnecessary or unjustified use of compulsory powers and the responsibilities of government to provide a sufficient supply of facilities and services to meet the needs of retarded people and to ensure that the standards of care so provided meet acceptable minimum levels. As the Victorian legislation stands there is no statement declaring that compulsory powers ought to be invoked as a last resort or requiring admission to an institution to be justified as the 'least detrimental alternative'.⁴⁹ In Britain the definition section contains inbuilt safeguards confining the use of compulsory powers to situations where there is a substantial threat to the welfare of others or the proposed patient.⁵⁰

South Australia has taken the process one step further in the course of enacting a new Mental Health Act based on the report by a committee appointed in 1975 to conduct a complete review of existing legislation and assisted by further consideration of the Bill by a select committee of the Parliament. The new legislation not only reflects the general policy that compulsory powers ought to be relied on as a last resort,⁵¹ but it also takes the ultimate responsibility for the admission of a retarded person other than on his own application out of the exclusive control of the medical and psychiatric professions and vests that responsibility in an independent body — a Guardianship Board — which combines medical expertise with legal and other disciplines.⁵² Under the new legislation the Board is granted wide and flexible powers to exercise a degree of oversight, care or control over the affairs of retarded people to ensure that they receive any necessary custody and care and are protected from exploitation or harm.⁵³ These new provisions go a long way towards ensuring that mentally retarded people in South Australia will, as promised in the second reading speech by the Minister, be afforded 'the maximum advantage that care and treatment can offer, and at the same time . . . guarantee[d] the minimum interference with their rights, dignity and self respect'.⁵⁴

⁴⁸ Mental Health Act 1959 (U.K.), s. 4; United Kingdom, *Better Services for the Mentally Handicapped* (1971) Cmnd 4683, 1-7.

⁴⁹ For a thorough discussion of the doctrine of the 'least restrictive alternative' and the constitutional decisions which lend support to it in America see Chambers D. L., 'Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives' (1972) 70 *Michigan Law Review* 1107, especially 1137-78.

⁵⁰ Mental Health Act 1959 (U.K.), s. 4.

⁵¹ Mental Health Act 1976-1977 (S.A.), s. 9(b); South Australia, *Parliamentary Debates*, House of Assembly, 14 October 1976, 1564. The Act has not yet been proclaimed.

⁵² Ss. 20-4; South Australia, *Parliamentary Debates*, *op. cit.* 1566.

⁵³ S. 27(1).

⁵⁴ South Australia, *Parliamentary Debates*, *op. cit.* 1564.

Similar provisions should be written into the Victorian legislation and consideration should also be given to the enactment of a provision spelling out the guiding philosophy of the Act.

The Victorian legislation is deficient in another respect in that it fails to provide any guarantee that a person who is clearly within the terms of the definition will be accepted for admission to a public facility.⁵⁵ This problem is particularly acute in the area of residential training facilities, as evidenced by the official figures quoted in the *Syme Townsend Report* disclosing that as at April 1975 there were 574 people on the 'most urgent' or 'urgent' waiting lists for residential care.⁵⁶ While this figure may in part be explained by the 'shortfall' in programmes providing an alternative to residential care, the Syme Townsend Committee also found that there was a deficit of the order of 1,025 places between the number of places currently provided and the standard of 1.3 places per 1,000 members of the general population which was set as the proper target.⁵⁷ Arbitrary and excessive though the standard of 1.3 per 1,000 may be, it lends support to the view that there are a substantial number of retarded people in Victoria who cannot gain admission to a residential facility, not because this would be a less desirable form of care but because of inadequate provision of facilities by the State. The magnitude of the discrepancy between existing patterns of care and the optimum arrangements to cater for the reasonable needs of the retarded is a matter for debate and resolution by members of the medical, social work and education professions in consultation with the community. These matters will not be canvassed in this article. Once they have been resolved however there should be a mechanism to ensure that these needs may be satisfied. Ultimately this becomes a question of resource allocation and thus of revenue raising and budgetary decisions which properly lie in the province of parliament. Nevertheless, consideration ought to be given to following the model provided in the recent South Australian Mental Health Act by framing legislation in terms which impose on the relevant Department of State a statutory duty to provide services to those people qualified.⁵⁸ The more radical solution proposed in the report of the British Columbia Royal Commission, to the effect that certain services might be enacted as a right capable of being tested by an application to a court for the remedy of a declaration, might also be evaluated.⁵⁹

The question of discharge from an institution is also important. In addition to the provision for a voluntary patient to request discharge or

⁵⁵ The legislation reflects the converse policy by expressly granting a power of veto to the Chief Medical Officer and others: Mental Health Act 1959, s. 41(7).

⁵⁶ *Syme Townsend Report*, *op. cit.* Appendix 14, 300.

⁵⁷ *Ibid.*

⁵⁸ Mental Health Act 1976-1977 (S.A.), s. 9(a); South Australia, *Parliamentary Debates*, House of Assembly, 5 April 1977, 3168. Cf. Children and Young Persons Act 1974 (N.Z.), s. 6 (a similar provision in the child welfare field).

⁵⁹ 'Children's Rights', *op. cit. passim*.

for a relative or friend to seek discharge on a patient's behalf⁶⁰ the Victorian legislation includes provisions enabling a patient to write directly to various independent people and establishing a system of official visitors to institutions.⁶¹ There is also a requirement that the superintendent or an officer appointed by the Mental Health Authority must examine each patient at least annually and tender a report on his 'mental and general health' to the Chief Medical Officer, who may take appropriate action.⁶² None of these avenues guarantees that there will be a searching independent review of cases on a regular basis. This situation could be remedied by legislating to create fixed term institutional orders which would lapse and lead to automatic discharge unless revived by a decision of an independent tribunal or board which would be required to conduct a thorough inquiry and perhaps consider a specific plan prepared for each individual case reviewed.⁶³ New South Wales legislated to this effect in 1967 and after a long delay brought the Act into operation in 1974, since which time it has operated successfully, albeit on a small scale.⁶⁴ South Australia established a Mental Health Review Tribunal to conduct reviews on a routine basis every six months (or once a year in the case of retarded people whose condition is considered not likely to ameliorate) during the sweeping review of its mental health legislation completed in 1977.⁶⁵ This legislation will protect a much wider range of people than is the case in New South Wales and it is therefore to be preferred to that model. Unless these reforms are instituted there will continue to be a substantial problem of 'mismatching' of resources to the needs of the retarded, with numbers of mildly or moderately retarded people inappropriately institutionalized for social or other reasons and severely retarded people denied the services appropriate to their needs.

Finally, some comments must be made about matters which are less responsive to a legal solution. Existing residential facilities for the retarded are unduly biased towards the 'mega-institution' of 500 beds or more. Almost seven in ten people in residential training facilities in Victoria are

⁶⁰ *Supra* 25 n. 37 and accompanying text.

⁶¹ Mental Health Act 1959, ss. 79 (letters), 66-78 (official visitors). The system of official visitors was evaluated in a British study which concluded that it was a very ineffectual protection: Greenland C., *Mental Illness and Civil Liberty* (1970).

⁶² Mental Health Act 1959, s. 82.

⁶³ Brakel S. J. and Rock R. S., *The Mentally Disabled and the Law* (rev. ed. 1971) *passim*.

⁶⁴ Child Welfare Act 1939 (N.S.W.), Part IX, ss. 43A-43I (as amended by the Child Welfare (Amendment) Act 1967 and again by Act No. 20 of 1977). The reviews must be held at least once in every 2 years but cover only people who were under the guardianship of the Minister prior to their 18th birthday and only if they remain under that guardianship after turning 18. At the end of 1975 there were 59 people subject to the jurisdiction of the Intellectually Handicapped Persons Review Tribunal: New South Wales, *Annual Report of the Department of Youth and Community Services — 1975* (1975) 43.

⁶⁵ Mental Health Act 1976-1977 (S.A.), s. 35(1) and (2). The bias is in favour of discharge unless there is evidence to convince the Tribunal that further care is necessary: s. 35(3).

accommodated in three of the eight institutions (Kew (940), Sunbury (893), Janefield (493)).⁶⁶ The historical legacy is largely responsible for this state of affairs, but there would be considerable benefit to be gained by following the British policy first enunciated in 1960 and reaffirmed in the 1971 White Paper, by declaring that in future no institutions in excess of 500 beds will be built⁶⁷ and by adopting long term strategies for breaking up existing institutions which exceed these guidelines. Another legacy of previous development of facilities is the disturbing geographic maldistribution of residential (and also day training) facilities. Two metropolitan and two country regions are substantially oversupplied, and of the remaining 14 regions in Victoria only two are close to a desirable level.⁶⁸ All the rest are in a parlous state, leading to the placement of people from those regions in facilities located at a considerable distance from their family and friends. The British White Paper set firm targets for relieving a similar geographic imbalance.⁶⁹ Victoria should follow suit.

B Day training centres

Day training centres in Victoria are required to be registered as incorporated bodies with the Hospital and Charities Commission⁷⁰ in order to be eligible for funds, but they are managed by a voluntary committee on the same basis as other non-government welfare services. Control over the standard of services provided is achieved through the controls which are implicit in the requirement that all private day training centres be registered pursuant to powers contained in section 35 of the Mental Health Act. Under that legislation these organizations are eligible for subsidy towards the capital costs of establishment and subsidy towards maintenance and running costs.⁷¹ The transport expenses of children in rural areas may also be reimbursed. Capital costs are at present subsidized on a \$4 for \$1 basis, while maintenance grants have been confined to meeting the full salaries of teaching staff approved by the Authority.⁷² Centres which have been designated as 'special development schools' operate in the usual way, with the Education Department assuming direct responsibility for staffing, equipment and educational programmes.

According to information collected for the *Syme Townsend Report* the net effect of these subsidies is that the government funds 80 per cent of the cost of capital works and around 72 per cent of running costs, with the balance being met from fees, donations and other private sources.⁷³ Once

⁶⁶ *Syme Townsend Report, op. cit.* Appendix 14, 295.

⁶⁷ United Kingdom, *Better Services for the Mentally Handicapped* (1971) Cmnd 4683, paras. 94, 241-3.

⁶⁸ *Syme Townsend Report, op. cit.* Appendix 8, 169 f.

⁶⁹ *Supra* 25 n. 44.

⁷⁰ Hospital and Charities Act 1958, s. 64.

⁷¹ Mental Health Act 1959, s. 35(4).

⁷² *Syme Townsend Report, op. cit.* Appendix 14, 299; Victoria, *Parliamentary Debates, Legislative Council*, 6 April 1977, 7306.

⁷³ *Syme Townsend Report, loc. cit.*

again, the major criticism of this programme is the absence of clearly enunciated government policy setting targets for the provision of adequate levels of services within each region of the State. Maldistribution of services between the various regions is no less severe than is the case with residential facilities,⁷⁴ not because of the historical legacy but because of the perverse effect of subsidy arrangements which compound the inequality by concentrating government funds on those wealthy areas most capable of raising the initial dollar to attract the matching \$4 government subsidy. As a matter of urgency this policy should be altered by allocating government funds to regions according to a needs priority determined by the recently constituted Health Commission in accordance with the express charter contained in that legislation.⁷⁵

C Educational services

The sections inserted into the Education Act by the amending legislation in 1973⁷⁶ cast a duty on parents and school principals to notify the relevant Minister of any child who 'appears . . . to be handicapped'.⁷⁷ A handicapped child is defined in the legislation as a child between 4½ years and 15 years inclusive who is suffering from a condition '[I]ikely to affect his educational progress unless . . . supported [by appropriate services]'.⁷⁸ The legislation goes on to provide that the Minister *may* direct that the child be assessed⁷⁹ by the Authority established under the Act, which Authority *shall*, if it is 'of opinion that the handicap . . . is such that he is in need of special education', recommend accordingly to the Minister for Special Education.⁸⁰ Finally, after considering the recommendation, the Minister shall make 'such determination as he considers suitable'.⁸¹ Fees are not to be levied for any services so provided.⁸²

This legislation is commendable in that it adopts a definition of handicap which bears a relationship to the achievement by the individual child of its developmental potential. There is however a potential weakness in the form of the machinery chosen to identify cases of handicap. Parents and school principals will not necessarily locate all cases. Consideration should therefore be given to introducing a regular medical screening for all children along the lines recommended by the British Columbia Royal Commission,⁸³ coupled with removal of age floors or ceilings which would prevent early entry to, or continuation of, services.⁸⁴

⁷⁴ *Ibid.* Appendix 8, 169 f.

⁷⁵ Health Commission Act 1977, ss. 7(2)(e), 7(3)(a).

⁷⁶ Education (Handicapped Children) Act 1973.

⁷⁷ S. 64E(1) and (2).

⁷⁸ S. 64A.

⁷⁹ S. 64F.

⁸⁰ S. 64G.

⁸¹ S. 64H.

⁸² S. 64I.

⁸³ 'Special Needs of Special Children', *op. cit.* 24 f., Recommendations 17-9.

⁸⁴ *Ibid.* Although the legislation quite specifically withholds any mandate for services to those under 4½ years or over 16 the responsible Minister referred several times during the course of the second reading debates to the government's commitment to

Furthermore, as the legislation now stands there is no guarantee that services will be provided for all children who are accurately assessed as in need of special education. This could be placed beyond doubt by clearly casting a mandatory statutory duty on the Authority to provide services in place of the discretionary *form* (the courts might nevertheless construe it as mandatory in substance) of the powers now vested in the Minister and the assessors.⁸⁵ Enforcement machinery such as the remedy of a declaration against the Authority might also be made available at the instance of any parent or interested 'next friend' of the child.

III FEDERAL GOVERNMENT PROGRAMMES FOR THE RETARDED

A Income support for children

(i) Children cared for in the community

With the exception of family allowance,⁸⁶ which is a universal payment for all children, and, in rare cases, special benefit,⁸⁷ the only form of income security available to a retarded child cared for in his own home is the Australian government handicapped child's allowance provided for in Part VIB of the Social Services Act (Cth). This benefit is available to people caring in their own home for a severely handicapped child under the age of 16 years⁸⁸ or, at the discretion of the Director-General of Social Services, to a person 'on a low income' who has the care of a 'substantially handicapped child' where the care of that child imposes 'severe financial

people 'between the ages of 0 and 21' and the Department of Special Education has been receptive to requests for continuation of services and has begun to develop programmes to effectuate this governmental (but not legislative) policy: Victoria, *Parliamentary Debates*, Legislative Assembly, 1 November 1973, 1793, 1794; 28 November 1973, 2771, 2801.

⁸⁵ The government strongly resisted a move by the Opposition to amend the legislation to this effect when the Bill was debated in 1973, pleading the lack of resources to support their stand: Victoria, *Parliamentary Debates*, Legislative Assembly, 23 November 1973, 2801 f.

⁸⁶ Family allowance was originally called child endowment. It was introduced in 1941 at a rate of five shillings per week by the Menzies government after pressure from the Labor Opposition and defection from government ranks on the issue: Australia, *Parliamentary Debates*, Senate, 15 May 1947, 2410, 2412. The title of the benefit was changed to family allowance in 1976 and the rates of benefit substantially increased in order to alleviate some of the problems of large families identified in the report of the Inquiry into Poverty in Australia in 1975.

⁸⁷ Special benefit is a discretionary payment paid at the same rate as unemployment benefit to a person where the Director-General is satisfied that 'by reason of age, physical or mental disability or domestic circumstances or for any other reason [a] person is unable to earn a sufficient livelihood': Social Services Act 1947 (Cth), s. 124(c). The benefit was originally introduced in 1944 and has always been confined to people not already in receipt of another pension or allowance and not eligible for unemployment or sickness benefit: Unemployment and Sickness Benefit Act 1944 (Cth), s. 36; Social Services Consolidation Act 1947 (Cth), s. 124(a) and (b).

⁸⁸ Social Services Act 1947 (Cth), ss. 105H(1) (definition of 'child' and 'severely handicapped child'), 105J. Eligibility for the allowance is dependent on the establishment of the fact that the child is in the custody, care and control of a person and resides in their private home, but this will not be lost by reason only of the fact that the child is absent from the home for a continued period of not more than 30 days: s. 105H(2)(b).

hardship'.⁸⁰ In the case of a person caring for a child who meets the statutory definition of severe handicap the rate of benefit is \$65 per month.⁹⁰ This benefit was introduced in 1974⁹¹ and is neither taxable nor subject to any means test⁹² but, contrary to the recommendations of the Commission of Inquiry into Poverty, it is not indexed to move automatically with increases in the cost of living.⁹³ Problems also arose until recently due to the arbitrary cut-off at age 16, which created hardship for handicapped adolescents for whom further education was desirable but where they were not qualified for invalid pension. Early in 1978 the Minister decided to allow special benefit at the rate of \$15 per week to be paid in such cases where the child continued in full-time education. The 1978 Budget later announced a government decision to amend the Act to extend payment of handicapped child allowance to cover a full-time student between the age of 16 and 25 years where that person does not receive an invalid pension.⁹⁴

Eligibility for the first category of handicapped child's allowance is conditional upon satisfaction of a criterion of 'severe handicap' and the establishment of residence in a private home as specified by the legislation. Severe handicap exists when a child:

- (a) has a physical or mental disability
- (b) by reason of that disability, needs constant care and attention and
- (c) is likely to need such care and attention permanently or for an extended period.⁹⁵

In order to enable the Director-General to establish whether a child satisfies these criteria there is provision for the child to be examined by a

⁸⁰ Senator Guilfoyle, *Social Security 1977-78: Information Papers* (1977); 'Handicapped Child's Allowance' in Australia, *Parliamentary Debates*, House of Representatives, 16 August 1977, 125 (hereafter cited as *1977 Budget Statement*).

⁹⁰ Social Services Act 1947 (Cth), s. 105L.

⁹¹ Handicapped Persons Assistance Act 1974 (Cth); Australia, *Parliamentary Debates*, House of Representatives, 13 November 1974, 3441; 27 November 1974, 4173.

⁹² The basic scheme of the present taxation legislation is *not* to tax benefits and pensions paid under the Social Services Act (Income Tax Assessment Act 1936 (Cth), s. 23AD(3)(d)(i)) unless they fall within the category of 'excepted payments'. The list of excepted payments includes the age or invalid pension when payable to a person of pensionable age (s. 23AD(1), definitions of 'excepted pension' and 'prescribed person' and para. (a) of the definition of 'excepted payment') together with the widows' pension, supporting parents' benefit and certain training allowances (s. 23AD(1), para. (b) of the definition of 'excepted payment'). Handicapped child allowance, invalid pension and sheltered employment allowances are not listed and therefore remain exempt from tax. A proposal to tax the latter two benefits, as announced in the 1978 Budget, was not proceeded with.

⁹³ *Henderson Report*, *op. cit.* 291. The rate was altered from \$15 per week to \$65 per month by the 1978 Budget.

⁹⁴ Press release by the Minister for Social Security, 'Additional Information on Particular [Budget] Items' (MG 78/31 (1978) Item D; Australia, *Parliamentary Debates*, House of Representatives, 15 August 1978, 133 (hereafter cited as 'Budget Statement'). The legislation was amended to this effect and came into force on 26 October 1978: Social Services Act 1947 (Cth), s. 105H(3) as amended by s. 37 of Act No. 128 of 1978.

⁹⁵ Social Services Act 1947 (Cth), s. 105H(1).

medical practitioner nominated by him,⁹⁶ but in practice applications are accepted for evaluation upon receipt of an application form certified by the child's doctor.⁹⁷ At the end of the 1978 financial year 21,200 people were in receipt of the allowance.⁹⁸ According to estimates provided by the Department approximately 13 per cent of all applications for handicapped child's allowance are rejected, principally on the ground that the review of the claim by medical officers in the Health Department is unfavourable.⁹⁹ Due to the importance of this medical judgment it should be noted that the Social Security Appeals Tribunals, established in 1975 to advise the Director-General in the exercise of his statutory jurisdiction to determine appeals under section 15 of the Act, do not have jurisdiction over medical appeals¹ although appeals on medical grounds against the rate of the assessment of a war pension administered by the Repatriation Department (now Veterans' Affairs) have been entrusted to an independent statutory tribunal since 1929.² Steps should be taken to provide more adequate machinery for dealing with medical appeals against decisions to refuse handicapped child's allowance. In the interim, people adversely affected by these decisions should be encouraged (and assisted if necessary) to exhaust the processes of internal Departmental or Ministerial review of decisions.

The discretionary payment for people suffering hardship as a direct result of caring for a substantially handicapped child not otherwise qualified for benefit as a severely handicapped child was announced in the

⁹⁶ S. 105N.

⁹⁷ Australia, Task Force on Co-ordination in Welfare and Health, First Report, *Proposals for Change in the Administration and Delivery of Programs and Services* (1977) Appendix E, 53 (hereafter cited as the *Bailey Report*). Expenditure on the program in 1976 was \$8 million, in 1977 \$10 million and for 1978 was \$16.3 million: Australia, *Department of Social Security Annual Report 1977-78*, 90.

⁹⁸ *Ibid.* 72.

⁹⁹ Australia, *Parliamentary Debates*, Senate, 21 September 1976, 794 (information supplied by the Minister in response to a question on notice). These figures compare with rejection rates of 16-22 per cent for domiciliary nursing care benefits; 20 per cent for supporting mothers' benefit; 16 per cent for double orphans' pension; 10 per cent for tuberculosis allowance and less than 0.5 per cent for child endowment, student allowance or maternity allowance, though it should be noted that in some of these categories special factors account for these figures: *ibid.*

¹ Australia, Department of Social Security, Policy Branch, *Social Security Appeals System: Principles and Procedures* (1974) Part 6, paras. 6.1-6.10. These appeals are handled internally by a panel of doctors advising the Director (Medical Services) and the Director-General, but in the case of handicapped child's allowance it is stated that, wherever possible, the panel of doctors will include 'a specialist in the particular field of medicine appropriate to the child's handicap': *ibid.* para. 6.6.

² Australian Soldiers Repatriation Act 1920 (Cth), ss. 45L-45Q (inserted by Act No. 14 of 1929, establishing Assessment Appeals Tribunals). See also Australia, *Report of the Independent Enquiry into the Repatriation System* (1975) 190 ff. Although a plea was made for the establishment of an independent means of dealing with social security appeals when the Social Services Act was first debated in 1947, no action was taken until 1975, and even these arrangements suffer from a number of weaknesses: Australia, *Parliamentary Debates*, Senate, 22 May 1947, 2749 (Senator McDonald); Mossman M. S., 'Issues in Law and Social Security' in *Essays on Law and Poverty: Bail and Social Security* (1977) (Commission of Inquiry into Poverty Research Report) 74.

1977 Budget³ and became operative in November 1977. For this group both the qualifications for the allowance and the rate of the allowance (subject to a ceiling of \$15 per week) are within the discretion of the Director-General.⁴ The administration of this discretionary payment is difficult to chart with precision. Under the original guidelines, which remained in force until February 1978, 'low income' was defined as a family income of not more than the adult minimum wage plus \$6 for each child. At that time the minimum wage stood at \$110.60 and approximately 98 per cent of wage and salary earners reported individual incomes in excess of this figure.⁵ The change to the benchmark of the 'average minimum weekly wage', made in February 1978,⁶ raised the ceiling for qualification as a low income earner, and for the March-June quarter of 1979 the maximum stood at \$169.30. On the basis of the distribution of incomes for all wage and salary earners, approximately 60 per cent of individual incomes would exceed this figure. However, many of the people below this level are reporting income from part-time earnings which may constitute a second income for the family unit in question. The workforce statistics also omit social security beneficiaries (unless they earn supplementary income) since they are confined to earned income. As a result, the proportion of families with a 'substantially handicapped' child who would fail to meet the low income criterion may be of the order of 80 per cent or more.

The statistics on the administration of the benefit confirm the prediction that the criteria are very stringent. Although the percentage of benefits paid as a proportion of the total population of children under 16 has risen from 0.4 per cent in 1976 to 0.53 per cent in 1977-78, only 57 allowances (or 0.27 per cent of all handicapped child allowances) were paid to low income families with a substantially handicapped child.⁷ In part this may be attributed to the fact that the administrative directive defines 'substantial handicap' as existing if a child is 'adjudged on medical grounds to be marginally below . . . severe handicap'; and to the fact that the extended benefit had only been in operation for eight months (and the more generous income criterion for only four months). Lack of publicity may also have contributed to the miniscule impact of the extension of eligibility, but serious questions remain concerning the desirability of introducing a separate discretionary category of benefit to accommodate a small number of cases, particularly since it can be argued that the 'special benefit' provision of the Act already conferred adequate power to make discretionary payments in cases of hardship.

³ 1977 Budget Statement, *op. cit.*

⁴ *Ibid.*

⁵ Australia, Bureau of Statistics, *Earnings and Hours of Employment of Employees: Distribution and Comparisons* (1976) 10, Table 4.

⁶ Australia, Department of Social Security, Benefits Branch Instruction 33/1978 (23 February 1978).

⁷ Australia, *Department of Social Security Annual Report 1977-78*, 71, Table 50.

Special benefit is now governed by section 124 of the Social Services Act 1947 (Cth), which provides that for a person who is not in receipt of a pension or allowance under another part of the Act and who is not a person to whom an unemployment or sickness benefit is payable:

The Director-General may, in his discretion, grant a special benefit . . . to a person—

- (c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependents (if any).⁸

This section was originally introduced in 1944 as section 36(a) of the Unemployment and Sickness Benefit Act (Cth) and subsequently became part of the present legislation. In the first few years of its operation it seems that this section was given a liberal construction, enabling cases of hardship to be alleviated on a humane and flexible basis. The responsible Minister, Senator McKenna, constantly referred to this discretionary benefit as a means of introducing flexibility in the administration of the Social Services Consolidation Act (Cth), which was introduced in 1947.⁹ This flexibility did not long survive. The arteries soon hardened to such a degree that the rules governing special benefit cases, as set out in the Departmental Benefits Manual, comprise one of the longest, most complex and least flexible sections of the internal instructions. It would be extremely unfortunate if the legislation and instructions designed to ease the harshness of the handicapped child's allowance provisions immediately duplicated the experience with the administration of special benefit. There are also good grounds for objecting to the introduction of a new provision to deal with a situation which the legislation already covers in section 124(c). The extension of the coverage of the handicapped child's allowance is of such a limited extent under the proposed guidelines that it clearly falls within the terms and the spirit of section 124(c), while section 125 already provides the Director-General with an unfettered discretion to fix the rate of a special benefit payable to a particular individual at any level not in excess of the rate of unemployment or sickness benefit.¹⁰

(ii) *Income support for children cared for in a residential facility*

For the handicapped child who cannot be cared for in a private residence the Australian government provides a payment of \$5 per day for each handicapped child under 16 years of age who is provided with residential accommodation by a religious or charitable organization.¹¹ The program

⁸ Social Services Act 1947 (Cth), s. 124(c).

⁹ Australia, *Parliamentary Debates, Senate*, 22 May 1947, 2743.

¹⁰ The reliance on section 124 to support the decision by the Minister early in 1978 to authorize the payment of special benefit at a rate of \$15 per week to a child over 16 who remains in full-time education but does not qualify for invalid pension on medical grounds indicates that this argument is perfectly tenable.

¹¹ Handicapped Persons Assistance Act 1974 (Cth), Part VII, ss. 22-6.

was first introduced in 1968 by amendments to the National Health Act (Cth) making an amount of \$3 per day available.¹² It was transferred to the Social Security Department in 1974, when the benefit was raised to \$3.50¹³ and short absences of up to four days away from the care of the residential facility were authorized for the first time.¹⁴ The present benefit of \$5 per day is payable direct to the organization concerned but the rate is not indexed.¹⁵ At the end of the 1978 financial year 1,349 children in 95 approved homes throughout Australia were in receipt of this indirect form of income support.¹⁶ Comparison between the rate of subsidy for handicapped children cared for in an institution (\$35 per week) and the maximum rate of \$65 per month for the handicapped child allowance payable to assist in supporting children in their own home reveals a serious anomaly. Although it can properly be argued that institutional care is more costly than domiciliary care, the size and direction of the present differential creates an economic disincentive to the implementation of a policy of 'normalization' aimed at reducing the numbers of children cared for in institutions. The rate structures should be urgently reviewed to remove this institutional bias.¹⁷

(iii) Capital and recurrent funds for facilities for the residential care of the retarded

Residential facilities became eligible for Commonwealth subsidy towards capital and recurrent maintenance and equipment costs through legislation introduced in 1970 as the Handicapped Children (Assistance) Act (Cth). Non-profit voluntary, charitable and religious organizations and local government bodies became eligible for subsidy towards capital works, maintenance, equipment or rent.¹⁸ The range of facilities eligible for subsidy was broadened in 1974 beyond the sheltered workshops previously covered. Subsidies are now paid under the Handicapped Persons Assistance Act 1974 (Cth) on a \$4 for \$1 basis for expenditure of this type.¹⁹ Additional assistance may also be provided towards operating costs through a scheme introduced in 1974 for subsidizing 50 per cent of the salary of

¹² National Health Act 1953 (Cth), Div. 5A, ss. 58A-58C (inserted by Act No. 100 of 1968).

¹³ Australia, *Parliamentary Debates*, House of Representatives, 13 November 1974, 3442. The National Health Act provisions remained for a short time until repealed by the National Health Act 1975.

¹⁴ Handicapped Persons Assistance Act 1974 (Cth), s. 24.

¹⁵ S. 23.

¹⁶ Australia, *Department of Social Security Annual Report 1977-78*, 86, Table 72. The cost to revenue was approximately \$1.7 million: *ibid.*

¹⁷ South Australia, Committee on Rights of Persons with Handicaps, *The Law and Persons with Handicaps* (1978) Volume 1: 'Physical Handicaps', 258, para. 20 (hereafter cited as *The Law and Persons with Handicaps*).

¹⁸ See now Handicapped Persons Assistance Act 1974 (Cth), ss. 3 (definition of 'eligible organization'), 9 (capital works), 11-13 (maintenance), 16-18 (equipment), 14-15 (rent).

¹⁹ *Ibid.*

approved staff²⁰ or — during the initial years of operation and with the approval of the Minister — up to 100 per cent in his discretion.²¹ At the end of the 1976 financial year 643 facilities ranging from training centres, activity and treatment centres to sheltered workshops and residential accommodation — catering for 38,000 persons — received some benefit under these arrangements; and by 1978, 949 facilities had been approved.²² Some of these facilities offer services which contribute to the ability of a handicapped person to avoid institutionalization but none qualify as domiciliary services properly so called. As a South Australian report has commented: '[i]t is perhaps the Commonwealth Handicapped Persons Assistance Act that stands most formidably in the way of a move towards funding that encourages normalization.'²³

The report noted that funding is confined to approved services provided on the premises (thus excluding organizations providing services in the home of the individual) and administered by non-profit-making bodies — a requirement which may exclude many self-help organizations.²⁴ The legislation should be revised to facilitate the implementation of a policy of normalization through the funding of domiciliary services or self-help organizations.

B Income support for adults

Income support for a handicapped person over the age of 16 years takes the form of a sheltered-employment allowance, an invalid pension (or a 'benevolent pension' if the person is living in a residential institution), unemployment benefit or special benefit, with the last two playing the lesser role. A sheltered-employment allowance is payable under Part VIIIA of the Social Services Act 1947 (Cth) and was introduced for the first time in 1967. It is available to a person provided with sheltered employment²⁵ by an approved organization²⁶ where that person is already qualified for invalid pension²⁷ or, in the opinion of the Director-General, is likely to become eligible for that pension if he is not provided with sheltered employment.²⁸ The allowance is paid on the same terms and conditions as invalid pension²⁹ and is governed by the same income (or 'means') test,³⁰

²⁰ S. 21(1).

²¹ S. 21(2).

²² *Bailey Report, op. cit.* Appendix E, 184. Expenditure on this program totalled \$30 million: *ibid.*; Australia, *Department of Social Security Annual Report 1977-78*, 84, Table 71.

²³ *The Law and Persons with Handicaps, op. cit.* 258, para. 21.

²⁴ *Ibid.* 258 f., paras. 21, 22.

²⁵ Social Services Act 1947 (Cth), s. 133D. The Director-General of Social Services is vested with reasonably wide discretion to make up his mind whether paid employment for disabled people satisfies this definition or not.

²⁶ S. 133C(1). An approved organization includes religious, charitable, ex-servicemen's, local government and similar organizations.

²⁷ S. 133C(1) (definition of 'disabled person').

²⁸ S. 133C(2).

²⁹ S. 133J.

³⁰ S. 28(2).

except that since 1975 a person in receipt of this allowance has been eligible to receive an 'incentive allowance' of \$5 per week without invoking the means test.³¹ At the end of the 1978 financial year 5,936 handicapped people in 133 workshops around Australia were in receipt of the sheltered-employment allowance.³²

Invalid pension is payable under Part III of the Act to a person over 16 years of age presently resident in Australia 'permanently incapacitated for work' who became so incapacitated in Australia.³³ Permanent incapacity is dependent on a medical assessment but it is deemed to be satisfied where the degree of incapacity is not less than 85 per cent.³⁴ Invalid pension is paid at the same base rate as age pension (presently \$53.20 per week for a single person) and is subject to the same income test (allowing the first \$20 per week free and reducing pension by 50 cents in the dollar thereafter), with a supplementary allowance of \$5 per week for pensioners in rented accommodation with very limited means.³⁵ An allowance or pension may be paid to an authorized person or body (or warrantee) if the circumstances require, but is normally paid directly to the pensioner.³⁶ The benevolent pension is an exception to this policy in that the Act provides for the invalid pension entitlement of a pensioner living in a benevolent institution to be divided so that the pensioner receives approximately one third and the balance is payable direct to the institution.³⁷

Legitimate concern has been expressed about some aspects of these arrangements, particularly the warrantee provisions, which are not effectively supervised where they are relied on and as a matter of administration are not normally invoked between close relatives, with a result that the signing over of cheques to the parents sometimes occurs in circumstances which raise doubts about whether the pensioner has made an informed and entirely free or independent decision. It is also argued that the rate of supplementary benefit is too low, thus creating major difficulties for retarded people or invalid pensioners seeking to establish themselves in the community, given that they will have limited experience in the effective management of their income and be perhaps more vulnerable than most to the pressures of a consumer society to undertake hire purchase obligations or enter into door-to-door sales agreements. Additional discretionary allowances to cushion the pensioner during such a period of adjustment would seem to be desirable to supplement an income level which is only barely adequate for people without these special problems. Finally, it would appear that attention could be given to administrative

³¹ S. 133JA.

³² Australia, *Department of Social Security Annual Report 1977-78*, 55, Table 13.

³³ Social Services Act 1947 (Cth), s. 24. Special provision is made for people who have left Australia or who are incapacitated while overseas: ss. 24A, 25.

³⁴ Ss. 23 and 27.

³⁵ Ss. 28 (rate and income test) and 30A (supplementary assistance).

³⁶ S. 40(1)(a) and (b), s. 43.

³⁷ S. 50.

arrangements which would minimize problems of delayed payments or unintentional overpayments (which are later recovered by the Department) which arise where pensioners move in and out of an institution with consequential substantial impact on the rate of pension personally payable due to the shift from invalid to benevolent pension or vice versa.

IV PLANNING FOR THE RETARDED

The problems of retarded people are not readily amenable to solution, perhaps least of all to a legal solution. The limitations of the law and of lawyers could be well illustrated in a number of other areas of the civil or criminal law apart from the questions of employment and income security which will be discussed in the remaining section of this article.

A Obtaining a source of private income from employment

The mildly retarded adolescent who wishes to establish a source of private income from part or full-time employment, either to supplement or provide an alternative to social security, faces a number of obstacles. In the first place, it is necessary to choose between sheltered employment and work on the normal job market. Mobility between these two categories is mainly in the direction of sheltered employment, due to the absence of provisions to assist a person seeking to make the transition from sheltered to open employment coupled with a deteriorating job market for unskilled marginal employees. Financial disincentives in the social security system, which set an austere level of 'allowable income' free of means test for a retarded person on unemployment benefit compared to the more generous levels and 'tapered' test applied to his counterpart in sheltered employment, also contribute to the problem.

(i) The dimensions of the problem

Australia does not have reliable census statistics — or even estimates — of the number of retarded people who manage to find — and retain — full-time employment, intermittent full-time employment, or part-time work on a casual or permanent basis. The report of the Commission of Inquiry into Poverty was not able to provide a clear statistical picture,³⁸ but the income survey did disclose that three per cent of the heads of income units were severely affected by 'sickness, accident or permanent handicap' to the extent that they were not in full-time work (or on sick pay) for eight weeks or more during the year.³⁹ A survey on long-term unemployment commissioned by the Inquiry found that three per cent of people registered with the Commonwealth Employment Service (C.E.S.) for six

³⁸ *Henderson Report, op. cit.* 284.

³⁹ *Ibid.*

weeks or more were mildly retarded.⁴⁰ The recent report by the Norgard Enquiry on the C.E.S. conceded that the statistics were inadequate in this area.⁴¹ More reliable information is however available for those people (not all of whom are retarded) in receipt of an invalid pension. The Poverty Inquiry found that 49 per cent of the income units headed by people on invalid pension were below the poverty line; that only 46 per cent had cash or investment reserves of \$200 or more and that 39 per cent of such income units were 'effectively dissaving' (by drawing on reserves) at a rate of more than \$4 per week.⁴²

(ii) *Incentives for retarded people seeking employment*

Open employment would substantially ameliorate or remove this financial poverty and at the same time create the conditions for a retarded person to participate more fully in the community. Until recently however there have been few programmes designed to assist a person to make the transition from sheltered to open employment or to assist retarded adolescents to enter open employment on completion of their education. Provision has been made for the payment to organizations running sheltered workshops of a set sum of \$500 for every person who has spent at least six months in the workshop receiving training and then manages to obtain and hold open employment for a continuous period of at least one year.⁴³ Statistics on the operation of this scheme point to its miniscule impact, since only 44 grants were made for the whole of Australia during 1976-77 and in the following year only 20 payments were made.⁴⁴ In part, the low take-up can be attributed to depressed economic conditions and the perhaps unreasonably lengthy period of continuous employment required. However, the South Australian review identified a more fundamental weakness in that the scheme applies the financial incentive to the institutions which prepare the individual for open employment. No financial reward or recompense for the expenses and risks of entering the open workforce is offered to the handicapped individuals who take advantage of opportunities offered to them to upgrade their skills to a level which enables them to successfully retain open employment.⁴⁵ As indicated in that report, there is a strong case to be made for making this cash grant available to the individual or at least to divide it equally between the workshop and the person concerned. This scheme should be reviewed to provide more substantial incentives for

⁴⁰ Jordan A. K., *Long Term Unemployed People under Conditions of Full Employment* (1975) (Commission of Inquiry into Poverty Research Report) 29. Most of these individuals were young people: *ibid.*

⁴¹ Australia, *Report of the Review of the Commonwealth Employment Service* (1977) 73, para. 5.3. The subsequent report by Dr Myers on unemployment benefit policy options did not take this issue any further: Australia, *Report of the Inquiry into Unemployment Benefit Policy and Administration* (1977) 20, para 4.12-4.24.

⁴² *Henderson Report*, *op. cit.* 285 f.

⁴³ Australia, *Department of Social Security Annual Report 1976-77*, 39.

⁴⁴ *Ibid.* 99, Table 66; *Department of Social Security Annual Report 1977-78*, 31.

⁴⁵ *The Law and Persons with Handicaps*, *op. cit.* 152, para. 51.

the individual and more realistic minimum periods of continuous employment as the qualification for payment.

The only other special assistance provided by the federal government is the pilot scheme introduced in Victoria in July 1977 to extend the NEAT scheme to encompass assistance for a handicapped or retarded person under 21 who is placed in open employment with an employer who is prepared to train that person with a view to permanent employment.⁴⁶ Under the scheme trainees are paid the award wage for the job for which they are training. For the first six weeks a government subsidy equivalent to the full award wage up to a maximum of 85 per cent of male adult average award wages (M.A.A.A.W.) is payable to the employer, while for the next 40 weeks a subsidy related to the age of the trainee is payable (at present this is 40 per cent M.A.A.A.W. for people aged 18-20 and 33½ per cent for those under 18).⁴⁷ Both schemes have some potential but it is unlikely that this potential will be fully realized unless, as a minimum, the proposals of the Norgard review of the C.E.S. are also implemented. These proposals, which are very similar to those which have operated in Britain for several years,⁴⁸ would involve increased specialization by C.E.S. staff at the regional and local level in developing liaison with institutions, special schools and sheltered workshops in order to promote programmes specially designed to accommodate both the local needs of retarded people seeking employment and also the particular features of the job market in the locality.⁴⁹ Indeed, given the increasing structural pressures being brought to bear on members of the community at the marginal end of the workforce, it is difficult to be sanguine about any programme or strategy short of a scheme of positive discrimination.

The Norgard report rather cursorily dismissed the suggestion that 'quotas' be set aside within the workforce for retarded or handicapped people.⁵⁰ This approach, which is modelled on the scheme introduced in Britain in 1944 under the Disabled Persons (Employment) Act, was examined in some detail by the South Australian Committee. That report also rejected the scheme, mainly on the grounds that it was dependent on a system of registration of disabled people who were unemployed — a requirement which labels the person as disabled and at best identifies only

⁴⁶ Details of the scheme were outlined in response to a question on notice in the House of Representatives: Australia, *Parliamentary Debates*, House of Representatives, 9 March 1978, 658. See also the Department of Employment and Industrial Relations explanatory memorandum on the National Employment and Training Scheme [NEAT] 'Handicapped Youth Programme' (N.H.Y.P.): personal communication to author. A similar cost-sharing scheme was introduced in British Columbia in 1976: Guaranteed Available Income for Need Act 1976 (Brit. Col.), s. 15.

⁴⁷ Australia, *Parliamentary Debates*, House of Representatives, 9 March 1978, 658.

⁴⁸ United Kingdom, *Better Services for the Mentally Handicapped* (1971) Cmnd 4683, 34, para. 157 (describing the 'disablement resettlement officers' and other programmes operated by the Department of Employment).

⁴⁹ Australia, *Report of the Review of the Commonwealth Employment Service* (1977) 90-3, paras. 5.52 and 5.62.

⁵⁰ *Ibid.* 75, para. 5.9.

a proportion of the intended population, and also required considerable administrative effort by the Department and employers, ultimately remaining dependent on the good faith of employers in making a judgment about the suitability or otherwise of people for employment. In addition, there was evidence of declining registration despite expansion of the workforce and an absence of evidence of a positive benefit in increasing the proportion of disabled people in employment or in protecting disabled employees from dismissal in times of economic restraint.⁵¹

However, the report went on to recommend that 'slow worker' permit schemes (which, subject to certain protections against exploitation of cheap labour, permit people to be employed at below award wages) should be publicized and other steps taken to remove absolute prohibitions in industrial safety codes where these unfairly discriminate against prospective employees with a handicap. It was also recommended that the Commissioner for Equal Opportunity should have jurisdiction over discrimination in employment which is solely related to handicap without reference to the capacity of that person to perform the functions essential to the job in question.⁵² Legislative and administrative policies relating to the employment of handicapped people should be revised to introduce financial incentives and other measures of positive discrimination and to provide for scrutiny of discriminatory practices by a body such as the Commissioner for Equal Opportunity in South Australia.

(iii) *Disincentives and barriers to open employment*

The inducement to remain on invalid pension under the existing arrangements is partly psychological but there are also strong practical and economic advantages to be gained. A pension is perceived by the community and the Department to be a long term benefit and therefore as a valuable right in the hands of the recipient which ought not to be lightly discarded. By contrast, a 'benefit' is perceived as a shorter term temporary form of income security.⁵³ There is also the practical consideration that under the existing all-or-none system, which pays benefit only to a person 85 per cent disabled, a decision to attempt full-time open employment may prejudice future applications for invalid pension by building up a sufficiently stable and useful employment history as to establish a presumption that the person is no longer incapacitated to the requisite degree. A particularly attractive solution to this question is that adopted by the Province of British Columbia in Canada in legislation enacted in 1976 expressly authorizing the suspension of income support for handi-

⁵¹ *The Law and Persons with Handicaps*, *op. cit.* 142-6, paras. 24-35.

⁵² *Ibid.* 147-63, paras. 36-73.

⁵³ The historical 'rationale' behind this distinction indicates that little thought was given to the matter at the time the legislation was first introduced: Lewis M. T., *Values in Australian Income Security Policies* (1975) (Commission of Inquiry into Poverty Research Report) 15.

capped people during periods where they are self-supporting, with immediate re-instatement without any further medical checks on loss of that employment.⁵⁴ Fringe benefits such as contributions towards transport or medical costs may be continued during the period where the person is self-supporting.⁵⁵ Both reforms might be considered for Australia.

Finally, at the economic level an unemployed retarded person with a private income from part-time employment or investments is treated much more harshly by the income test applied to unemployment benefit than is the case for an equivalent person on invalid pension or sheltered employment allowance. This is because unemployment benefit carries a 'fixed ceiling' test which reduces benefit by one dollar for every dollar of private income over and above a small zone of 'allowable' income which is exempted.⁵⁶ By contrast, the zone of allowable income is much broader for a pensioner (currently \$20 compared to \$6) and private income or earnings beyond that zone reduce pension by only 50 cents for every dollar.⁵⁷ For example, a single person on unemployment benefit during the twelve month period from 1 November 1978 to 1 October 1979 would be held to a fixed ceiling of \$57.45 per week, while a person on invalid pension could earn income of \$20 per week without prejudice to pension (i.e. a total of \$73.20 with pension) and pension entitlement would then taper away and finally disappear at around \$126.40 per week.

B Obtaining a source of private income and capital by inheritance or gift

(i) The retarded person in institutional care

The management of the affairs of a retarded person who has been admitted under the involuntary procedures of the Mental Health Act automatically passes to the Public Trustee.⁵⁸ A person admitted as a voluntary patient may elect to transfer his affairs⁵⁹ — they do not pass automatically⁶⁰ — and once transferred the authority may be revoked.⁶¹ Retarded people in the community who 'by reason of . . . mental infirmity are incapable of managing [their] affairs'⁶² may also apply to have their affairs handled by the Public Trustee. This latter group also has the option of relying on private arrangements such as trusts and powers of attorney. These will be dealt with below.

The provisions of the Public Trustee Act have been criticized on the ground that they are too narrow in scope — covering only those who are *incapable* — and too inflexible in their operation — in that there is no

⁵⁴ Guaranteed Available Income for Need Act 1976 (Brit. Col.), s. 12(1).

⁵⁵ S. 12(2).

⁵⁶ Social Services Act 1947 (Cth), s. 114.

⁵⁷ S. 28.

⁵⁸ Public Trustee Act 1958, s. 3(iii) and (iv) ('protected person'; 'patient'), s. 49.

⁵⁹ S. 48A.

⁶⁰ Mental Health Act 1959, s. 41(8).

⁶¹ Public Trustee Act 1958, s. 48A(3).

⁶² S. 28(1).

provision for part of the property to be left in the hands of the protected person.⁶³ The provisions of the South Australian legislation which extend the role of the Public Trustee to encompass partial as well as complete incapacity and permit management of part only of a person's affairs⁶⁴ should be copied in Victoria.

(ii) *The retarded person in the community*

One of the most pressing of the legal problems faced by a retarded person and his relatives derives from the fear that an individual of marginal competence will suffer a deterioration in his condition or lose the domiciliary or financial supports which are provided by relatives and so crucial to his continued functioning in the community. The validity of schemes which seek to replace the retarded person by a person who has a power of attorney or which seek to finance the continued provision of domiciliary services after the death of a parent or close relative is therefore a matter of considerable importance in minimizing the risk of institutionalization.

The present position with respect to a power of attorney executed by a retarded person while he retained the requisite capacity appears to be that the authority lapses immediately that capacity is lost, with the result that the intentions of the retarded to empower someone other than the Public Trustee to act on their behalf are defeated.⁶⁵ The A.C.T. Law Reform Commission has been very critical of the law on this point and has quite properly recommended that it be placed beyond doubt that a validly executed power of attorney may effectuate the desired intention. This proposal should be enacted in Victoria. Lest it be thought that this reform is unnecessary because of the availability of the device of the trust, it should be noted that the trust suffers from the disadvantage of separating the legal and beneficial ownership of the property and of generating administrative costs associated with the management of the trust.

Loss of relatives is less traumatic where they have sufficient property to generate an income enabling the retarded person to be provided with an adequate disposable income and for the requisite supportive services to

⁶³ Bray J., 'The Legal Rights of the Mentally Retarded in Relation to their Civil Liberties' (1971) 1 *Australian Journal of Mental Retardation* 133.

⁶⁴ Aged and Infirm Persons' Property Act 1940 (S.A.).

⁶⁵ The law on this point is rather obscure. It is discussed further in A.C.T. Law Reform Commission, *Report on the Management of the Property and Affairs of Mentally Infirm Persons* (1973) 9. The degree of competence required to execute (and sustain) a valid power of attorney is at least as high as that for a contract for reward; that is, a capacity to know and understand the nature and effect of the transaction. Where however the power of attorney is an incident of a scheme based on a settlement *inter vivos* transferring property to a trustee, then the higher standard applicable to a will or other testamentary disposition is probably required both for the validity of the power of attorney and the settlement itself. The settlor would therefore need to establish that he had (and retained) sufficient intelligence to recall the nature and extent of his property, an understanding of the group of people with a present (or future) moral or financial claim on his bounty and a capacity to judge those claims in an independent and a rational fashion: *Crago v. McIntyre* [1976] 1 N.S.W.L.R. 729, 740-2, *per* Holland J.

be purchased for the retarded person after their death. Where substantial sums are involved this intention can be implemented by a carefully drafted deed of trust executed during their life or by a trust constituted by their will.⁶⁶ In either case a discretionary trust should normally be chosen so that there is sufficient flexibility to accommodate changed circumstances and unforeseen needs.

For the less well-endowed relatives the disadvantage of the discretionary trust lies in the cost of preparing an appropriate trust deed and the drain imposed by management fees. This deficiency could be overcome by extending the role of the office of the Public Trustee to encompass offering advice⁶⁷ and a standard form of trust deed which would effectuate these plans. There could also be provision for a contribution to be made by government to the cost of meeting management fees, or management might be undertaken by the office of Public Trustee.⁶⁸

There are two further problems, both related to the cost of providing supportive services from estates of limited value. One method of eking out finite funds is to pool estates in order to achieve economies of scale. These so called 'guardianship schemes' are popular in America, but they run into difficulties due to the unequal needs of the retarded persons participating, thus leading to grave problems of achieving equity between contributors.⁶⁹ These problems cannot readily be overcome without the participation of a much wider sector of the population, perhaps by linking them to private superannuation schemes or to a Public Service or national scheme capable of spreading these special costs over a large population.

The reference to superannuation schemes highlights the second problem: that of inflation, which can rapidly deplete capital reserves. As is the case with occupational superannuation schemes, the only viable solution to this problem is to expand the scope of the schemes and to consider introducing an indexation payment funded from government taxation revenues to 'top up' benefits.⁷⁰ Short of these measures, very marginal gains might be made by making available to parents of retarded children a list of Victorian (or Australian) cohorts with a very similar prognosis so that some more broadly based schemes might be planned as private trust schemes.⁷¹ Consent would be required in order to protect privacy.

⁶⁶ Allen R. *et al.*, *Mental Impairment and Legal Incompetency* (1968) 181 (considerations relevant to drawing a sound trust deed for the retarded).

⁶⁷ Hodgson R. J., 'Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem' (1973) 37 *Albany Law Review* 407, 428-30 (citizen advocacy programmes in Nebraska and Washington).

⁶⁸ *Ibid.* 436 (referring to the system operating in Washington, U.S.A.).

⁶⁹ *Ibid.* 407, 426.

⁷⁰ See the discussion of these problems by the Hancock Committee: Australia, *National Superannuation in Australia*, Interim Report (1974); Final Report (1976).

⁷¹ Another alternative is to offer a statutory limited liability guardianship service through the office of the Public Trustee along the lines of the New York and Louisiana schemes. These schemes permit the retarded person who is in employment to manage income and bind himself to contracts to a combined value of a month's wages: Hodgson, *op. cit.* 433; Solberg M. P. *et al.*, *op. cit.* 411. There is also the

C Planning to promote the interests of retarded people who have an actual or potential source of private income

The crux of the problem which confronts a legal adviser requested to arrange the affairs of a retarded person who has an actual or potential entitlement both to a private income and also to a pension or benefit funded out of the public purse is to devise a legal arrangement which resolves the dilemma created by a social security system based on the assumption that comparatively homogeneous categories of people can be created where each member of the group would have equivalent needs but a varying capacity to meet those needs from their private funds (which difference is ironed out by a means test) — and the reality that for a 'category' such as the retarded, diversity of needs — both between individuals and, with the passage of time, for particular individuals — is the hallmark of the area. That tension between the uniformity so characteristic of the social security administration and the 'considerable internal diversity' of the retarded as a group has generated other problems which have already been touched on in this article.⁷²

Two aspects of the legislation governing invalid pensions and sheltered-employment allowances present this tension in a particularly acute form. First, there is the problem of the person on the borderline between qualifying for a full pension as a person at least 85 per cent disabled and being rejected outright on the ground that the degree of disability is marginally below that required, in which case no pension is payable.⁷³ The second issue is no less acute but the dilemma may be capable of resolution through proper arrangement of the affairs of a retarded person. It involves the retarded person who is in receipt of a social security pension or allowance and is living in the community by virtue of the voluntary unpaid care and services in kind extended by the family or relatives of the retarded person. On the death of those members of the family the services in kind (which do not affect the rate of pension) cease, and in the normal event the retarded person will inherit a substantial capital asset which will generate income which may be in excess of the 'free zone',⁷⁴ thus leading to a reduction in pension. The net result may well be that the combined income from pension plus the inheritance will be insufficient to enable the retarded person to purchase the necessary accommodation and other expensive domiciliary services required to continue living in the community. These two matters will be examined in turn below.

model provided by the experimental scheme in Colorado which assumes that the retarded person has full capacity to manage his affairs unless a court makes a specific order taking a particular matter out of his hands: *ibid.* 410; Hodgson, *op. cit.* 420. Cf. Allen, *op. cit.* 109-12 (critique of the Minnesota State Guardianship plan).

⁷² *Supra* 000.

⁷³ Social Services Act 1947 (Cth), s. 23.

⁷⁴ At present the free zone is \$20, beyond which pension is reduced by 50 cents in the dollar: s. 28(2).

(i) *Part rate invalid pensions?*

As the Poverty Inquiry pointed out, the degree of severity of a handicap is partly a medical matter, but [it] depends also on the assets and circumstances of the whole man. . . . Despite such complexities, a rating of the degree to which [an individual] is hindered in the task of earning a living is basic to the concept of the invalid pension and degree of handicap is relevant to the distribution of any special service for handicapped people. The obvious difficulty here is that the dividing line between those eligible and those not eligible for assistance is of necessity hard to draw, and leads to inequity between people with similar degrees of handicap on opposite sides of the boundary.⁷⁶

In an attempt to mitigate the harshness of a system which pays a full pension to a person 86 per cent incapacitated and no pension to a person 84 per cent incapacitated, the Inquiry considered the introduction of 'part rate' invalid pensions similar to the part rate war pensions.⁷⁶ After due consideration of the matter the report concluded that a system of part rate pensions grafted on to the existing social security arrangements would multiply the number of rate schedules to such a degree as to lead to administrative chaos.⁷⁷ Approval in principle was extended to the concept of part rate pensions, but it was recommended that implementation be delayed and that they be introduced only in conjunction with the scheme for a 'guaranteed minimum income' as proposed by the Commission.⁷⁸ Reform of the invalid pension provisions to enable part rate pension to be paid ought to be accorded a high priority, but it is not so urgent that it cannot be delayed for a few years while the government and the community debate the merits of a guaranteed minimum income scheme, particularly when the introduction of the two reforms as part of one package would substantially reduce administrative complications which would otherwise be presented. The recommendations of the Commission on this point should therefore be supported.

(ii) *Preserving pension entitlements while catering for the special needs of the retarded*

The assistance which a retarded person may require in order to continue to live in the community following the discontinuance of services in kind provided by family or friends can be very costly in financial terms if it must be purchased on the open market. Funds to enable these services to be purchased cannot however be placed at the disposal or accrue to the benefit of the retarded person without running the risk that they will be caught by the wide definition of 'income' in the Social Services Act 1947

⁷⁶ *Henderson Report, op. cit.* 282.

⁷⁶ *Ibid.* 289. The system of part rate war pensions is discussed in more detail in the Toose Report: Australia, *Report of the Independent Enquiry into the Repatriation System* (1975), 280-90.

⁷⁷ *Henderson Report, op. cit.* 289.

⁷⁸ *Ibid.* The scheme is outlined in detail elsewhere in the report: *ibid.* 67-87. Variations on the Henderson scheme may be found in: Priorities Review Staff, *Possibilities for Social Welfare in Australia* (1975) 20-3, 27-41; *Negative Income Tax and Tax Credit Systems* (1974) (Treasury Taxation Paper No. 8) 1-4, 6-8; New Zealand, *Royal Commission on Social Security: Report* (1972) 160-3.

(Cth), thus producing a reduction in the rate of pension which may be sufficient to destroy the continued economic viability of that individual remaining in an independent — or semi-independent — state in the community.

'Income' is defined in the Act as

any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source . . . and includes any periodical payment or benefit by way of gift or allowance from a person other than the father, mother, son, daughter, brother or sister. . . .⁷⁹

No problem arises with respect to gifts or allowances from a close relative prior to their death, but in the absence of an amendment to the legislation to provide a partial or total exemption for income produced from assets transferred by, or inherited from, members of the immediate family (or exempting income earned by the personal efforts of the retarded person),⁸⁰ or, alternatively, amendments which would make certain expenditures of income on approved welfare or medical services allowable deductions, reliance must be placed on schemes devised for tax planning purposes. One option would be to transfer a capital asset in a form which will not in practice generate an income in the hands of the pensioner. Transfer of a residential property would suffice while the retarded person was the occupier, since the statutory definition of income does not extend to the 'notional' income which the property would generate if made available for rental.

Where the assistance required on the death of the family member takes the form of personal services (such as social work, housekeeping or management services), which can only be purchased through the payment of 'income' in the form of a wage or cash sum, it is clearly necessary to make a liquid asset available for the benefit of the retarded person without falling foul of the definition of income by placing that income in his hands. As it stands, it would appear to be possible to achieve this result by constituting a discretionary trust on behalf of a number of retarded people, which trust would hold the capital assets or income fed in by the parents, with a discretionary power to apply the funds to pay the salaries or fees of welfare or other personnel, who, in the discretion of the trustees, would provide services to benefit particular retarded individuals at a particular time.⁸¹

⁷⁹ Social Services Act 1947 (Cth), s. 18.

⁸⁰ Age pension for a person over 70 years of age and invalid or age pension for a person who is permanently blind are already free of 'means' or income tests. Private income from whatever source does not therefore affect the rate of pension: s. 28(2AA) (introduced in 1973).

⁸¹ The beneficiaries under this trust arrangement would not have any vested right to any portion of the income generated and any benefits ultimately derived would not only be in the discretion of the trustee(s) but at the time they were 'received by that person for his own use or benefit' (s. 28) would not be 'personal earnings, moneys . . . or profits'. Nor would the service received appear to involve a sufficient *quid pro quo* to fall within the term 'valuable consideration' as that term is ordinarily understood (and in any event the term 'valuable consideration' must no doubt be read down on the

Prior to the death of the family member there is no advantage to be gained under this scheme since the liquid asset could of course be paid to the retarded person by, for example, his father. Such gifts or allowances fall outside the statutory definition of income,⁸² so the retarded person could then use this income to purchase services without reduction in pension. Indeed, in the ordinary course of events it would be more convenient for the parent to provide or pay for the required service directly. It follows that the major incentive to implement such a scheme will be to preserve the status quo on the death of the person who formerly provided the service (or paid the 'exempt' income to the retarded person) without prejudice to the rate of pension. The scheme outlined does not involve the pensioner in anything which could be characterized as a disposal of income in order to qualify for or increase the rate of pension, so it does not contravene section 47 of the Act which would otherwise enable the Director-General to reduce the pension by an amount equivalent to the value of the income foregone.⁸³ Nor should the scheme be caught in this way. It does no more than preserve an existing rate of pension following the death of a member of the family who previously paid an exempt allowance or tendered services in kind. The scheme is therefore entirely consistent with the principles already enshrined in the Act.

Since there may be some difficulties regarding the taxation of undistributed income accumulated by the trust⁸⁴ under the arrangement outlined above (though this may be compensated for in terms of reducing the impact of probate duty if it is carefully drawn), consideration might also be given to the alternative of taking advantage of the statutory exemption in the Act which provides that 'a payment [other than an annuity] . . . by way of benefit from a friendly society'⁸⁵ is not to be treated as income in the hands of the recipient. The legislation defines a friendly society as any body 'registered or incorporated' as such under the relevant state laws,⁸⁶

application of the *noscitur a sociis* principle of statutory interpretation, since the balance of the language — and the object to be defined — is directed towards creating a category of liquid assets as distinguished from capital assets).

⁸² *Supra* 48 n. 79 and accompanying text.

⁸³ The income in question arises from an external source beyond the control of the pensioner (unlike private earnings or income from investments in his name) and the income is not at any stage received by him or under his control, so he cannot be classified as a person who 'has directly or indirectly deprived himself of income in order to qualify for . . . or obtain a pension at a higher rate'. The Director-General therefore does not acquire a discretion to reduce the rate of pension as provided for in the Act: Social Services Act 1947 (Cth), s. 47(1).

⁸⁴ Income Tax Assessment Act 1936 (Cth), Part III, Div. 6, especially s. 98. The cost of administering the trust and the difficulty of obtaining agreement between a group of parents of retarded people once it is realized that the condition of one beneficiary may deteriorate so markedly that a single individual will gain the benefit of a disproportionate share of the total contributions fed into the trust by the other parents are two further practical barriers to be overcome before such a scheme would be viable: *supra* 45.

⁸⁵ Social Services Act 1947 (Cth), s. 18 (definition of 'income', paragraph (a)).

⁸⁶ S. 6(1).

which for Victoria is the Friendly Societies Act 1958. Under this legislation it would appear that a benefit not exceeding \$30 per week might be paid by a society, in accordance with the rules, to a retarded person in respect of whom contributions had previously been made.⁸⁷

These schemes will however at best serve as a temporary expedient. They merely provide an opportunity for those relatives of retarded people with a sufficiently large income or accumulated assets to purchase domiciliary or other services during their lifetime to be able to plan their affairs in a manner which mitigates the financial penalty which would otherwise be imposed on the retarded person on their death. Such schemes will be of no possible benefit to retarded people who are capable of living in the community but who do not have the advantage of a relative or friend willing or able to devote private funds towards the purchase of domiciliary or other support services. The solution of this wider problem requires government intervention to fund the provision of adequate services. Recent policies of the Australian government have seen a reduction in funding for such services and a shift towards expenditure on institutional programmes. The South Australian report expressed 'disappointment that the Federal government in its current [1978] budget has halved its subsidy for domiciliary care services'.⁸⁸

Certainly, if these trends are not reversed the private schemes outlined above will continue to play a part in ameliorating the position of retarded people. Hopefully however they will be rendered redundant by systematic reforms of the legislative and administrative policies discussed.

V CONCLUSION

This article has examined some of the complexities inherent in the existing pattern of welfare services and income security arrangements for retarded people. In some areas deficiencies and anomalies in the law became apparent. Most of these legal issues can be satisfactorily resolved only through statutory reforms. The majority of the problems uncovered however were of a more intractable nature, requiring not merely legal reforms but changes to the more fundamental aspects of economic and power relationships responsible for perpetuating the status of retarded people as that of a deprived minority group within the community. The subjects canvassed in this article cover only a small portion of the total range of legal issues of concern to retarded people but the selection is not unrepresentative of the field as a whole. Undoubtedly, the principal conclusion to be drawn from this survey is that there is no simple legal panacea for the multiplicity of problems generated for people who are members of minority groups such as the retarded. The law has a part to

⁸⁷ Friendly Societies Act 1958, s. 5(1) and proviso to s. 16(6).

⁸⁸ *The Law and Persons with Handicaps*, *op. cit.* 183, para. 34.

play in finding a solution to those problems but it is by no means a major role. The matters canvassed in this article may perhaps contribute towards the law and lawyers accepting the challenge of that supporting role and assisting in the task of overcoming the disadvantages summed up by the Royal Commission on Human Relationships:

[D]iscrimination against the handicapped exists in many forms. Their problem stems from a failure to treat them as people. Handicapped people are not subhuman and do not want to be treated that way. They only ask that 'normal' social welfare systems be modified to accommodate their needs. Their position must be seen in terms of increased social justice, rather than in increased social welfare benefits, and one of the main ways to achieve this is through integration into the mainstream of society.⁸⁹

⁸⁹ Australia, *Royal Commission on Human Relationships: Final Report (1977)* Volume 5, 118, para. 131.