

CQ
KI
5404

SOCIAL SECURITY

UNIVERSITY OF N.S.W.
24 APR 1986

Number 29 February 1986

Opinion

The AAT is still handling a heavy work-load; and many of the cases coming up for decision present complex questions.

In *Kennison* (p.362) the AAT looked at a possible contradiction between State criminal law and the *Social Security Act*, and rejected a DSS argument that a young woman could not be the *de facto* wife of an unemployment beneficiary if she was under the age of consent fixed by State law. The AAT said (cautiously) that, if there had been evidence of a sexual relationship, then no extra unemployment benefit could be paid to the man with whom she was cohabiting; but, if (as in this case) a *de facto* relationship could be established through other factors, then the extra benefit should be paid. While the result of the case is welcome, the AAT's reasoning is disturbing. It accepts that a State law can affect the meaning and administration of the *Social Security Act*: does this mean that the welfare rights of Australians will vary from one part of Australia to another?

In *Stoilkovic* (p.362) the AAT raised some long overdue criticisms of the cohabitation rule. The AAT queried the discriminatory impact of the rule, which works against people in heterosexual (but not homosexual or sibling) households. The AAT also made the point that the administration of the cohabitation rule often poisoned relations between the DSS and its clients. These criticisms are not novel: but they are timely, because Bettina Cass is about to start on the Government's review of income support.

Another possible conflict between different legislation was raised in *Stewart* (p.359): the AAT decided that the Federal *Bankruptcy Act* (which obliges creditors to claim against the bankrupt's estate rather than against the bankrupt) did not prevent the DSS from using its power (under s.140(2) of the *Social Security Act*) to deduct an overpayment from a current pension or benefit.

The first appeals against assets test decisions have now been decided by the AAT. Both *Smith* and *Jamieson* (p.364) focused on the discretion to disregard assets in cases of hardship; and suggest that the AAT will adopt a hard line in this area. In *Jamieson* the AAT put forward its view of the purpose of the assets test. It was, the AAT said, 'designed to discourage uneconomic use' of assets. We thought that its purpose was to stop avoidance of the pension income test by schemes which (magically?) turn income into capital gains, and to concentrate resources on people in need.

The Full Federal Court has overturned the decision in *Koutsakis* (1985) 26 SSR 322: see p.366 in this issue. The Court said that a person who refused to undergo medical treatment could be 'permanently incapacitated for work' even if his refusal was irrational or groundless, so long as the refusal was based on reasons genuinely held by him. This view is welcome - not only for Mr Koutsakis, who should be commended for his persistence, but also because it reduces the potential for social control by the DSS.

P.H.

In this issue

Opinion	... 357
AAT decisions	
• Sickness benefit: loss of income (Oakley) ...	358
• Age pension: portability (Dracup) ...	358
• Recovery of overpayment: bankruptcy (Stewart) ...	359
• Late claim: misleading advice (Martin) ...	360
• Unemployment benefit: student (Long) ...	360
• Special benefit: disabled student (Robson) ...	361
• Cohabitation: age of consent (Kennison) ...	362
• Cohabitation: law reform (Stoilkovic) ...	362
(Stuart) ...	363
• Assets test (Smith, Jamieson) ...	364
• Handicapped child's allowance: late claim (Sewell) ...	364
• Income test: superannuation (Lewis) ...	365
Federal Court decisions	
• Invalid pension: permanent incapacity (Annas, Koutsakis) ...	366
Legislation	
• War restitution payments ...	367
• New portability rules ...	367
Background	
• Social security needs of Aboriginal people ...	367

The *Social Security Reporter* is published six times a year by the Legal Service Bulletin Co-operative Ltd.

Editor: Peter Hanks **Reporting:** Peter Hanks, Jenny Morgan **Administration and reviews editor:** Brian Simpson

Typesetting: Jan Jay, Kasia Graphics **Layout:** Peter Robinson

The *Social Security Reporter* is supplied free to all subscribers to the Legal Service Bulletin. Separate subscriptions are available at \$20 a year (one copy), \$35 a year (two copies) or \$45 a year (three copies).

Please address all correspondence to Legal Service Bulletin, C/- Law Faculty, Monash University, Clayton 3168.

Copyright © Legal Service Bulletin Co-operative Ltd 1985 Registered by Australia Post—Publication No. VBH 6594