prospect of the pension moneys ever being transferred to Australia was so remote as to make the entitlement to them either nugatory or of no relevant benefit. The Indian pensions were not 'moneys earned' nor 'moneys derived' as they were now of no 'use or benefit' to the Hoogewerfs. This was enough to distinguish the present case from the Federal Court decision in *Inguanti* (1988) 44 *SSR* 568.

[B.W.]

Recovery of overpayment: double punishment

COLMER and SECRETARY TO DSS

(No. S87/253 and 254)

Decided: 2 August 1988 by J.A. Kiosoglous.

The applicants appealed against decisions to recover overpayments of invalid and wife's pension pursuant to s.140 of the *Social Security Act*. Both had worked under false names and had failed to advise the DSS of their employment. As a result Mr Colmer was overpaid $8463 and Mrs Colmer $5528. Each was convicted of fraud and sentenced to 12 months' imprisonment with a non-parole period of 9 months.

At the time of their imprisonment the financial affairs of the Colmers were 'in a very poor state' brought about by mortgage arrears on their home and arrears of outstanding domestic accounts. Both were in ill health.

Mr and Mrs Colmer were in gaol from 27 March 1986 until 9 September 1986. On 4 August 1986 their adopted son committed suicide. This and the ill-health of another son led to the Colmers being released from gaol for 'compassionate' reasons.

Following their release, the DSS again sought to recover the overpayments from on-going pension entitlements. An appeal to the SSAT succeeded on the grounds of financial hardship and that in sentencing them to imprisonment the magistrate meant this to be a 'once-only punishment'.

The AAT was given details of the Colmers' financial circumstances. The DSS argued that the only issue for determination was whether it was appropriate for the decision-maker to exercise his discretion to waive or write-off or defer the debt to some future date. It disputed argument for the Colmers that, if they were obliged to repay the overpayments, this would amount to a further punishment in addition to the term of imprisonment. The AAT felt it appropriate to consider the issue of double punishment.

In so doing it approved the case of *Letts* (1984) 23 *SSR* 269 in which Davies J considered the concept of 'double punishment'. The failure on the part of the prosecution to ask for reparation did not bind the Secretary to the DSS. There was no evidence that the trial judge imposed a sentence upon the view that Letts would not have to repay the moneys which he improperly received.

The AAT agreed. There was no evidence that, when the magistrate imposed the sentence, she did so with the view that the Colmers would not have to repay the overpayment. The fact that the prosecution had omitted to ask for an order seeking reparation did not restrain the DSS from exercising its powers under s.140(2).

> 'Accordingly, in this Tribunal's view the respondent has every right to pursue recovery action in this matter, provided only that the applicants' financial circumstances are such that recovery does not cause them undue hardship.'

The AAT went on to consider the financial circumstances of the appellants. It found that they had received public moneys to which they were not entitled; the overpayments arose as a result of dishonesty; though their financial circumstances were 'strained' they were not in 'extreme hardship'. But their financial circumstances did indicate that recovery should be delayed. The AAT rejected the DSS argument that the Colmers' home could be used to secure a further debt to repay the overpayment as 'this would only increase the debts already outstanding'. However, the AAT saw no reason why the house should not be used as equity at a future date after the mortgage had been fully repaid.

The Tribunal said the case was one in which there was a clear case of fraud and dishonesty, yet it was inconsistent with social welfare principles to impose an undesirably heavy burden on the applicants. The AAT decided against the exercise of the discretion in s.146 but recommended the Colmers make an acceptable offer to the DSS to repay half the overpayments and that the Secretary exercise the discretion under s.146 to accept part repayment.

[B.W.]

Recovery of overpayment

GIDDENS and SECRETARY TO DSS

(No. W87/178)

Decided: 29 April 1988 by R.D. Nicholson.

The AAT *varied* a DSS decision to recover an overpayment of widow's pension, amounting to $1325, from Maureen Giddens.

The overpayment had occurred because of changes in Giddens' earnings from part-time employment, and her failure promptly to inform the DSS of these changes.

Giddens was now earning about $190 a week, net, and had regular outgoings of about $170. Her only assets were an old car, furniture and personal effects. She had offered to pay off the overpayment at the rate of $5 a week.

The AAT said that the debt should not be waived or written off, under s.186(1) of the Social Security Act, because of Giddens' offer to pay it off.

However, bearing in mind Giddens' marginal finances, the presence of negligence, rather than fraud, on her part and the fact that public money was involved, the overpayment should be recovered by instalments, 'in amounts and for periods determined by the Respondent': Reasons, p.7.

[P.H.]

Supporting parent benefit: custody, care, and control

LEAHY AND SECRETARY TO DSS

(No. D87/2)

Decided: 4 August 1988 by R.C. Jennings.

Mary Leahy was receiving invalid pension on the ground of schizophrenia. She was refused additional pension for her 16-year-old daughter Loanne, as the delegate considered Mary did not have 'custody, care and control' of Loanne. Leahy asked the AAT to review this refusal.

The evidence

The AAT heard evidence by telephone from Leahy, who lived in the Northern Territory. She had met Mrs W, and Mrs W's daughter, Mrs Smith, when she was a cook at a Seventh Day Adventist Mission in Northern Australia. At the time of Loanne's birth in 1976, Leahy was having violent epileptic fits. Medical advice indicated she could not live alone with Loanne, so mother and child stayed with Mrs W in Perth until September 1976. During this time Leahy accepted full responsibility for caring for Loanne.

Leahy returned to her original home in Daly River after it became apparent it was 'unfair' for her to continue living with Mrs W. Mrs W agreed to care for Loanne until she was old enough to go to school. In the following year Loanne went to live with Mrs Smith where Mary visited her on at least two occasions. When Loanne was old enough she visited her mother in the Northern Territory on at least 6 occasions. Emotional ties between mother and child remained strong and there was 'a significant amount of contact having regard to the relative situations of mother and daughter'.

It was arranged that Leahy's then supporting parent's benefit be paid into a bank account in her name in Perth, but that Mrs W would withdraw amounts equivalent to the benefit payable for the child, send a regular amount to Mary, and leave the balance in the bank to be used as occasion demanded. This continued until the additional invalid pension for Loanne was refused.

No question of adopting or formal fostering of Loanne arose, although there were indications of a 'private fostering' arrangement. The Smiths were granted 'child endowment' and later 'family allowance', as they were regarded as having 'custody, care and control' of Loanne for the purposes of Part VI of the Act as it then was.

Pensions Manual

The DSS supported its refusal of additional pension by referring to s.28(1AA) of the *Social Security Act* [now s.33(3)], which at the time entitled an unmarried person to an increase in pension if the person had the custody, care and control of a child.

Chapter 13 of the Pensions Manual was also cited. The guidelines purported to add a requirement of 'significant control over the child's activities'. The AAT said of the guidelines:

> 'Although they may be useful for pointing to circumstances which may serve to qualify a pensioner for an increase they cannot operate to deny a pension to a person who fulfils the precise requirements of the Act.'

Legal considerations

The AAT considered it was the existence of the 'right to control which is the dominant consideration, not the extent to which it is in fact exercised'. Whether delegation of 'the right to control' to a person standing *in loco parentis* constitutes a complete abrogation of the responsibilities of parenthood will depend on other matters, the most important of which may be the question of 'care'. This includes physical, mental, moral and emotional matters. Health, schooling, love, comfort, discipline, hygiene are all essential to the total concept of care, as are a multitude of other considerations.

The AAT referred to other cases in which delegation of parental responsibilities had occurred. Insofar as these suggested that the terms of the delegation must be limited in time and scope the AAT disagreed, saying:

> '. . . there is an implied term that any such delegation is limited by the ultimate right of the parent making it to vary the terms unilaterally or terminate the arrangement altogether, . . . a delegation which fails to specify time or to define precisely the nature and extent of responsibility is not void like a legal contract would be void for uncertainty.'

The AAT concluded that, on the facts, Leahy had retained sufficient custody, care and control to warrant payment of additional pension for a child whose factual custody was delegated to a limited extent, not to the extent of abrogating either control or care. The fact that there was little evidence of actual control was sufficiently explained by the facts, and compensated for by the extent of care that was provided.

The degree of significant care as well as control must be considered. Even if 'significant control' is a *relevant* factor, the AAT said, the *determining* factor is the extent of care and control.

Formal decision

The AAT set aside the decision under review.

[B.W.]

Handicapped child's allowance: eligibility

PRYOR and SECRETARY TO DSS (No. W85/205)

Decided: 4 August 1988 by R.C. Jennings.

The AAT set aside a DSS decision and directed that Marie Pryor was eligible to receive an allowance in respect of her severely handicapped child, C, from 17 November 1986, the date on which the allowance had been cancelled.

The facts

C suffered from asthma and enuresis (bed-wetting) and it was not disputed that both conditions were likely to require care and attention for an extended period. The care was provided by her mother. Pryor also contended that her daughter had developmental delay for which her mother gives her regular care and attention. The DSS argued this did not constitute a mental disability.

A Commonwealth medical officer's report, dated 14 November 1986, noted:

> 'Child has mild asthma treated with a Ventolin Rotohaler 2 times per day. May have developmental delay and require assessment by a developmental pediatrician but does not require extensive care on that basis. Has enuresis but is 7 years old and improvement might be expected.'

He concluded that C was neither a severely handicapped nor a handicapped child.

In 1985 C's primary school teacher noted definite progress but that C was 'well below average . . . requiring individual attention in most lessons'. Another school report in June 1987 noted that C was 'slipping further behind in all language areas and needs constant supervision to complete activities'. The teacher expressed concern at the lack of progress and with C's subsequent frustration with her lack of comprehension.

The legislation

The relevant provisions at the time were s.105H(1), s.105J and s.105JA of the *Social Security Act* [now replaced by the provisions dealing with child disability allowance, ss.101-109].

Section 105H(1) defined a 'handicapped child' as one who was not severely handicapped but had a