

*Mental Retardation: Law Policy and Administration*, by Susan C. Hayes and Robert Hayes, Sydney, The Law Book Company Ltd., 1982, xxviii + 428 pp. (including index). \$29.50 (cloth cover), \$19.50 (limp).

The authors and their publishers are to be congratulated on this important new work, the first of its kind in Australia. Indeed even in the United Kingdom, from which our law was largely derived, there is (it is believed) nothing, in its comprehensive review of the subject, to compare with this book.

The authors (husband and wife), were professionally and emotionally well equipped to undertake this labour of love (for that, no doubt, is largely what it was) which will immediately take its place as the classic text on the subject, a permanent monument to their industry and compassionate concern for the mentally retarded. Susan and Robert Hayes, in and through their respective disciplines (Susan as Senior Lecturer in Behavioural Sciences in Medicine, University of Sydney and Honorary Psychologist, Royal Alexandra Hospital for Children, and Robert as Associate Professor of Law, University of New South Wales) admirably complemented each other in producing a book which is not simply a law book, for lawyers, but a work which surveys the whole gamut of special issues of law, of government and social policy, and of administration, arising from the special nature of the mentally retarded, and the relationship between the mentally retarded and the society of which they form a not insignificant part, numerically and otherwise. The extent of the authors' industry and the comprehensive nature of their undertaking may be gauged, in small part, from the Table of Cases, and Table of Statutes. Over 300 cases (Australian, English, United States, and others) are referred to, as well as some 150 separate statutes.

When I personally was asked, in 1978, to address a Conference on the subject of "The Intellectually Handicapped and the Law" (see *Quadrant* magazine, October 1978), I had this (amongst other things) to say:

*THE LAW HAS NO ANSWER*

"What does the present law say about the mentally handicapped?" Some of you may think it *discriminates against* the intellectually handicapped, and so in some ways it may. But the first and most important answer to the question is this: *That the law scarcely knows they exist.* And the law's *concern* for the intellectually handicapped is *also almost non-existent.*

There are various ways in which this may be clearly demonstrated. No law student in Australia I believe is taught about the law as it affects the mentally handicapped. There is no course in an Australian University devoted to the topic. There is not a single Australian textbook dealing solely, or even substantially in any way, with the matter. And the average lawyer, like myself, if asked about the law as it may affect the mentally handicapped in a particular respect — say voting, the making of contracts, the right to marry, or as the case may be — would be lost for an answer and would have to go groping through textbooks and case law, or statute law in an attempt to find it.

As like as not there would be no clear answer; or if there were, the answer, if found, would be unsatisfactory, or unjust, or discriminatory, or unenlightened, to say the least.

The plain fact is that the intellectually handicapped themselves have never been in a position to ask questions of the law; nor, until very recently, has anyone endeavoured to do so on their behalf. No one knows what the law is, so far as the intellectually handicapped are concerned, because no one cared. It's as simple as that.

Four years later, in 1982, largely thanks to the publication of this book and that alone, those remarks of mine are no longer wholly true. The publication of this book will I believe prove to be a milestone along the road towards a proper appreciation of the position of the mentally retarded in Australia, and as such an important further step towards the reforms which are necessary in many areas.

Whilst concerned with what the law, policy and mode of administration should be — and not merely to describe what it now is — the book is *not* in any way polemical. On the contrary it is eminently sober, realistic and well balanced, as the authors move in common sense fashion from one to another of the hundreds of previously unasked or unanswered questions which arise, and systematically provide the best answers that can be given. Let us take a typical example, the way in which the authors deal with the right to vote (pp. 272-276). First, the book deals briefly with the position in practice (most mentally retarded, it seems, do *not* exercise the vote), and the ideal, as stated in the Bright Committee's Report ("intellectually handicapped persons should not be disenfranchised unless the handicap precludes any comprehension of the meaning of an election"). Then the law is reviewed — the law of the Commonwealth, and the law of each of the six States. The position is then summarised as follows:

By any of the definitions in Commonwealth or State legislation, many retarded people, resident in the community or classified as informal patients, have the right to vote. Probably more have the right to vote than do actually exercise that right. Overprotective attitudes of care-givers, ignorance of their rights, and other practical hindrances, such as failure to enrol or to notify change of address, have effectively disenfranchised many retarded people. Furthermore, the compulsory voting requirement is not in fact enforced against retarded people.

A number of criticisms of the present situation can be made:

- (a) Inadequate definitions in legislation (for example, "of unsound mind" and "mentally ill") can cause confusion, and may lead to discrimination against retarded people.
- (b) The situation wherein a person is entitled to vote in one State but not another, or in a Commonwealth election but not a State one, needs to be resolved. The cognitive tasks do not differ between elections.

Retarded citizens should be encouraged by their families and care-givers to exercise the right to be included on electoral rolls, and to vote.

Some idea of the comprehensive nature of the work will be gained by a description of the subject matter of the thirteen chapters. The first defines "mentally retarded" and other important terms, and provides a brief outline of the nature of the Australian legal system. The second provides a glimpse of the many questions relating to mental retardation arising from events before or at birth, including for example matters connected with genetic counselling, the "right to life" of the abnormal foetus, abortion and so called "wrongful life", "wrongful pregnancy", "wrongful birth" and "dissatisfied birth". Next, a chapter dealing with issues in the medical care of retarded people, including the issue of consent, the right of a retarded person to treatment (often denied or curtailed, or sought to be denied or curtailed, in practice), the ethics involved in prolonging, or not prolonging life, the refusal of treatment, sterilisation, eugenics, and prediction of development. Part of the authors' Conclusion to this chapter reads as follows:

Some of the most horrific examples of abuse of and discrimination against retarded people involve medical treatment. Unnecessary sterilisation; inadequate treatment for mild complaints (such as eczema, infections or sensory defects); refusal of treatment resulting in the patient's death; mental experimentation; administration of medication to ensure adult patients sleep from six p.m. to six a.m.; incarceration of infants in institutions solely on the basis of medical advice; cruel or uncaring administration of treatment (sometimes justified on the grounds that retarded people do not feel pain); behaviour modification or aversive stimuli for sexual behaviour — these and other examples of medical maltreatment abound. Not only are retarded people often subjected to *unwarranted* medical procedures, but on the other hand, necessary medical treatment may be withheld because they are retarded.

The value of the input from both lawyer and psychologist, husband and wife, and their joint concern for moral and ethical values and dilemmas, is nowhere more evident than in this chapter.

The next succeeding chapter deals with education. It is a most valuable contribution. Some idea of the approach will be gained by quoting the authors' conclusion to the chapter:

Education for atypical students has many faults and omissions; these include inadequate provision of services in specific areas, such as early childhood education, adult education and sex education, but the most significant problem area is the provision of free, appropriate, public education for all children. There are still many children who are effectively excluded from government schools, or from any education system, and many others who are placed in inappropriate programmes and taught by untrained and unskilled teachers.

This chapter has examined the possibility of using certain administrative law and common law remedies to help redress inequalities in education. As has been demonstrated, while use of the legal avenues may give education systems a prod in the right direction,

and highlight the dilemmas facing retarded pupils, their parents and educators, the outcome cannot be predicted. The end result may be that nothing concrete or long term is achieved. If reform is to occur in the provision of appropriate educational services for retarded students, the greatest benefits will be gained by amending the legislation so as to provide clear, specific statements of educational aims and duties of governments.

How fortunate for the mentally retarded, their parents, and the community that these two people, Susan and Robert Hayes, psychologist and lawyer, should have been drawn together into the task of writing this book, which neither could possibly have undertaken alone.

"Sooner or later" (the authors say) "in the life of every retarded person, two important questions have to be asked:

- where will the retarded person live?
- where will he or she work?"

The answers to these two questions form the subject of Chapter 5.

The next succeeding chapter contains a valuable review of the patchwork quilt of benefits and subsidies for mentally retarded citizens — adequate in some areas, quite inadequate or non-existent in others. Next, a valuable chapter on non-government agencies serving the mentally retarded and the means of controlling or influencing their conduct. Next follow chapters on guardianship, and financial and property management, respectively (the latter including contracts, wills and tax planning for the mentally retarded). Then a chapter dealing with the rights of mentally retarded people not dealt with in earlier chapters — voting (dealt with earlier in this review), marriage, capacity to care for children, rights to privacy and information.

Under the next chapter heading, "Compensation for Injury and Outrage", a wide variety of important issues are dealt with, including, for example, the questions: Is there a "right" — not to be born defective? — to be allowed to die? — to appropriate services? — to appropriate parental care? The same chapter deals with assault, negligence, occupiers' liability to retarded persons, corporal punishment and the use of correctional therapy (such matters as electro-convulsive therapy, etc.) Here, as elsewhere throughout the work, nothing is shirked. Susan and Robert give us "good measure, pressed down, and shaken together, and running over".

In a penultimate chapter the authors look realistically at the retarded person's means of access to justice (and of course the lack of it) — the legal and administrative procedures available, class actions and representative actions, covering up of abuse, official investigation of abuse, and so on. The last chapter deals with the criminal law and the retarded person. It is followed by a glossary and an adequate index.

This pioneering, highly-principled work will prove to be a powerful influence for good, and an indispensable tool for all who are concerned for the welfare, and just and compassionate treatment, of the mentally retarded.

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