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978-0-521-72024-3 - Duty of Care in the Human Services: Mishaps, Misdeeds and the Law

Rosemary Kennedy

Excerpt

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Part 1

Positioning and mapping the territory of human service mishaps and misdeeds

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The shadow world

HUMAN SERVICE ACTORS face the world with imagined identities built on good intentions and high ideals, while simultaneously casting a deep and sinister shadow. These reflexive human service images are constructed around and promulgated through the aspirational language of professional literature and education, codes of ethics, principles undergirding social policies, organisations' mission statements, standards of practice and individual belief systems. Identities are understandably articulated through lofty rhetoric, stamped with a leitmotif of human rights and social justice. These concepts are both the ostensible rationale for, and drivers of, much human services policy and system, organisation, program and worker activity. The slogan 'duty of care' peppers the lexicon of the human services. Under this honourable banner – but often based on an imperfect understanding of its legal meaning, limitations and implications – the human services march with confidence in the integrity of their endeavours.

The shadow world on the other hand is declaimed through commissions, reviews, enquiries, inquests, court cases, complaints mechanisms, advocacy groups, victims' stories, the media and popular books.¹ It is inhabited by tales of extensive, sustained and repeated neglect, cruelty and maltreatment in institutional and community services. Vulnerable groups

¹ For example: Maushart, S. (2003). *Sort of a Place Like Home: Remembering the Moore River Native Settlement*. Freemantle: Freemantle Arts Centre Press. Hill, D. (2007). *The Forgotten Children: Fairbridge Farm School and its Betrayal of Australia's Child Migrants*. Sydney: Random House. Raymond, B. (2007). *The Baby Thief: The Untold Story of Georgia Tan, the Baby Seller who Corrupted Adoption*. Sydney: Random House.

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in society – the mentally ill, children, adolescents, aged people, prisoners, Indigenous people, asylum seekers and the disabled – are in this world routinely abused and neglected by service systems, agencies and workers in the realm of the human services. The shadow world has been populated in recent times by media-driven images of a child's body floating in a suitcase, children dead of starvation, mentally ill citizens incarcerated in immigration detention centres and innumerable others, equally shocking, discordant and seemingly inexplicable. These images are etched into the public consciousness.

In relatively recent times, many formal reports of failures of child protection systems and of child care in institutions and the community have emerged (eg Stanley 1999; Layton 2003; Crime and Misconduct Commission 2004; Senate Standing Committee on Community Affairs 2004, 2005; Mudaly and Goddard 2006; Mullighan 2008; Wood 2008; AAP 2008e). British child migrants have been brutalised in state and non-government organisations that are meant to be caring for them (eg Hill 2007). Care by and in immigration systems and facilities has been the subject of damning reviews (eg McMillan 2005; Palmer 2005; Raynor 2005). The treatment of Indigenous children taken into care or left unprotected in the community is a perennial weeping sore in Australian society (eg Wilson 1997; Haebich 2000; Wild and Anderson 2007). The failure of mental health systems and services is a recurring theme (eg Burdekin 1993; Williams and Keating 1999; ABC 2008a). Aged-care facilities and services have come under scrutiny through deaths and injuries in nursing homes and deaths in the community that have gone unnoticed for weeks (eg Glenndenning 1999; ABC 2000; IBN News 2006). Young people in need of a home and quality care have been short-changed (eg Burdekin 1989). Disabled people have been treated inhumanely in care (eg Office of the Health Complaints Commissioner Tasmania 2007; ABC 2008b) or have received less-than-adequate care (eg Carter 2006). Prisoners have been brutalised routinely in prisons (eg Nagle 1979; Grabosky 1989). There is a litany of major failures to care or in care.

This shadow world is also populated by innumerable large and small individual hurts, sour relationships, lost opportunities, discourtesies, indignities and unmet expectations, which are contributed to by routine system, agency and worker action and, commonly, inaction. These private misfortunes are not the stuff of media stories, or investigatory processes, nor are they the focus here, but they contribute nonetheless to the depth and impact of the human service shadow world.

It is not surprising that the human services are attended by shadows – they engage with the most vulnerable and marginalised people. Society’s ambivalence about the function, rights and status of the vulnerable and the marginalised has been extensively rehearsed by sociologists. Human service agents are subject to the ebb and flow of changing social norms, political agendas and mixed messages about the deserving and undeserving in society, their rights and responsibilities, and the objectives and standards of assessment and intervention. Human service agents operate in the most contested and fraught arenas of social life, where interests, rights, responsibilities and risks are finely balanced, and human dysfunction is usually present and often extreme. As Webb (2006 p. 3) says of the social services and the whirlpool of contradictory imperatives in which they operate and are shaped – they are ‘at the eye of the storm’.

The human services function as the sweepers of society, gathering up and containing human debris. Their social legitimacy, like that of their clients, is doubtful, even more so when a law-and-order agenda prevails. The human services, made up largely of women, are seen as doing dirty and not particularly skilful work (Camilleri 1996). In Stoesz’s (2002 p. 23) words, ‘social work, much to its detriment, has become associated with providing second-class services to second-class citizens’. Much of the social unease about the human services is played out in its poor, or sad and marginal (Henderson and Franklin 2007) public image, in which it is seen as ineffective at best (Franklin and Parton 1991; Golding 1991; Brawley 1995; McInnes and Lawson-Brown 2007; Mendes 2008).

Society’s ambivalence both underpins and is affirmed by the strange paradox of the human services. On the one hand, human service functions involve the management of extremely sensitive and contested negotiations between individuals, groups, communities and society. To be performed competently, these negotiations demand considerable wisdom, knowledge and skill. On the other hand, human service functions are actually undertaken by variably qualified and often inexperienced, relatively low-status people, accessing limited resources, relying on what is widely construed as common knowledge, in an occupationally unregulated sector. This situation is a recipe for disappointment or even disaster, and an infinite number of incipient shadows. However, the paradox also gives rise to examples of extraordinarily committed, courageous and creative human service activities.

Every profession and many areas of human endeavour are advertised as highly principled, while simultaneously sponsoring a dark side – their shadow. Schön’s (1991) seminal work detailed the crisis of confidence in

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all professional groups and arenas since the 1960s. Health systems, the law, religion, politics and sport are examples of professions and fields in which high ideals and positive aspirations coexist with villainy, malfunction and calamity. Nevertheless, there are some particularly jarring inconsistencies and peculiarities about the human service shadow world and the one which creates it.

The human services shadow world is composed of failures that are particularly terrible, recurrent and wide-ranging. Several generations of Indigenous families, whole populations of client groups (eg children in residential institutions), and a great number of other individuals (eg in immigration detention, and mental health and alternative care), have been damaged if not destroyed by systems, agencies and workers with mandates ostensibly anchored in humanitarian principles. Yet, this trail of destruction is completely at odds with the public rhetoric and self representations of the human service 'real' or 'official' world. Although the human services imagine themselves stepping forward into the sun and caring, observers see the looming shadows which attend them. Shadows are more apparent to observers than to those who cast them.

The extent of trauma and the public clamour contrast starkly with the strangely loud silence in the world which casts the shadow. Apart from bouts of Stoesz's notion (2002) of professional victimhood, the mainstream 'official' professional human service practice world behaves as if its shadows, and the accompanying public distrust, do not exist.

The reluctance of any profession or sector to engage in public self-flagellation is unexceptional and the few human service attempts may not have been considered newsworthy. However the public profile and the breadth and depth of tragedy in the human services shadow world is strangely underrepresented in academic and other commentary, which is targeted primarily at an internal audience. There is a significant imbalance between the weight and extent of external material on failures in the human services, and the limited literature that specifically addresses policy, system, organisational and worker shortcomings, and the resultant harm. The professional and scholarly commentary on misadventure and malpractice in the human services is minimal in Australia, and only slightly more extensive overseas. The core curriculums of human service courses, social work included, do not address past and current deficiencies that have injured clients and communities or that have the potential to do so again. In fact Schorr (2000 p. 133), from the United States, has castigated schools of social work for being 'studiously blind to endemic violations of good practice'.

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Australian Social Work, published by the Australian Association of Social Workers (AASW), is arguably the major professional journal for the sector, yet it contains few articles that focus on malpractice, or significant human service failure. A search by the author of this book, from 1948, a year after the first version of the journal began, until December 2008, for titles indicating a central concern with legal liability for damage caused, malpractice, negligence, breaches of ethics or standards, or committees of inquiry into human service endeavours, produces a tiny list, most concerning children. Browne's three articles (Gaha 1992) on the Maria Colwell death and the Beckford Inquiry in the UK in the 1970s–1980s are clearly attempts to understand how and why human service systems produced or failed to prevent tragedy. More recently, there has been one article on legal suits (Collingridge 1991), one on breaches of the AASW code of ethics (Murray and Swain 1999), one on the abrogation of practice standards in alternative care (Gilbertson and Barber 2004), one on the Queensland Crime and Misconduct inquiry into the abuse of children in foster care (Lonne and Thomson 2005), one on the risks to children of risk assessment procedures (Gillingham 2006) and one on the role of continuing education in protecting clients from social worker-caused harm (Kent 2006).

This is not to say that other articles in *Australian Social Work* and elsewhere do not attend to substandard or potentially substandard systems and activity, but this tends to be incidental to the main focus of the articles and not of interest in its own right (eg on later access to records for institutionalised children, see Murray et al. 2008, and Healy 2004). For example, the Australian social work law writer Swain is represented in law journals with articles on social work liability and social work failure (eg Swain 1996; 2003). There is some psychology commentary in Australia on how to avoid malpractice suits (eg McBride and Tunnecliffe 2001; O'Brien-Malone and Diamond 2006). Service failures are also sporadically recognised in the childcare literature (eg Kiraly 2002; Penglase 2004). As will be evident throughout this book, there are a number of Australian law commentators, most notably Freckelton (eg 2007a), who have analysed recent high-profile human service cases. Even so, within Australian legal literature there is no compilation of human service cases and commentary.

Internationally, there is a body of scholarly literature in the United States on social work malpractice and legal liability, in which the comprehensive work of Reamer (1992; 1995; 2000; 2001; 2003a; 2003b) predominates. Even so, Reamer (1992 p. 168) notes the denial of and/or inattention

to impaired social workers and their activities within the profession in the US, and asserts that: ‘members of the profession must be vigilant in their efforts to confront the incompetence, unprofessional conduct, and unethical activities of their colleagues’. Also in the US, Besharov’s (1985) *The Vulnerable Social Worker* and Bullis’ (1995) *Clinical Social Worker Misconduct* do not take a broad human service perspective, although their material is generalisable. Instead, they incline towards the individual social worker as the target of malpractice and private legal suits. There is also a body of more theoretical and policy-orientated material in the UK, including works that detail human service failure in the context of related questions, such as media images (eg Franklin and Parton 1991), the aetiology of scandals (Butler and Drakeford 2005), and the phenomenon of risk, which is discussed later in this chapter.

There are many interconnected reasons for this apparent silence within. The human service shadow domain is perpetually raw; never amenable to reflection from a safe historical and emotional distance as new tragedies regularly emerge. From within the human services, the shadow world is the product of a few individual ‘bad apples’, or ‘the other’ (occupational or professional grouping or organisation, or part of the sector), or the result of a previous approach to intervention, or the product of inadequate resources or bad policies, or all of these things. Of course these views are valid in particular situations, but they are incomplete.

No tradition and few mechanisms exist in the official human services world for dealing with contributions to the shadow world and their legacies. The human services, unlike medicine or aviation (eg Merry and McCall-Smith 2004; Ranson 2006), have minimal or rudimentary acceptance of and processes for responding formally and consistently to errors, adverse events and negative consumer experiences. However, standing committees on child deaths connected to child protection services are becoming more common.

Manthorpe and Stanley (1999 p. 232) commenting on institutional failures in the human services argue that external public enquiry is the prevailing ‘tradition’ for dealing with bad outcomes and that little relevant research is conducted because it is difficult. Research on system, organisational and individual worker shortcomings does face ethical and legal hurdles, and is not popular with research funding bodies or sponsors. Multiple consecutive enquiries produce large amounts of information about the forms of failure and the damage caused, and keep the shadow world well populated. However, the phenomenon of multiple enquiries does not build knowledge about integrated service system structures, arrangements

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for effective service delivery, helpful intervention methods or supportive policies and procedures. Enquires seldom have a role in the implementation or monitoring of responses to earlier recommendations. Each new enquiry discovers yet again what has been found by earlier investigations. At times of catastrophe, shortcomings of the human services are reviewed from the outside, to show that something is being done, and with a reactive, rather than a prospective, agenda.

The human services are not well endowed with research money and lack a tradition of practice and outcomes research and research-informed practice (Gibbons 2001; Stoesz 2002; Furedi 2004; McDonald 2006). Human service approaches to service delivery, assessment and intervention, are undeveloped or compromised, depending on one's epistemological position. Some social theorists (eg Webb 2006) argue that social work practice has been colonised by technical rationality and has lost touch with its value and ethical base.

Others (eg Gambrill 2006), including the author of this book, take a more empiricist, evidence-based practice stance. We argue that intervention activity is not well-supported by continually emerging data or debates about new techniques, processes and procedures, but is largely ideologically based (eg Gibbons 2001) and haphazard. Bessant's (2004 p. 12) assertion about operationalising human rights aspirations in youth work applies here: 'rights talk often remains rhetorical'.

Perhaps there is a deficit of commonplace technical conversation in the human services, which serves in many other professions to occupy the very wide space between lofty ideals and professional failures. This kind of conversation can assist us to understand and tackle performance deficits. High ideals have a powerful presence in social work literature (the predominant form in the human services); failures are absent and between the extremes are only sporadic conversations about things that are amiss.

Those responsible for human service systems and institutions are generally busy closing ranks in the wake of a recently exposed or unfolding tragedy. In Lonnie's (2005) reasonable view, such people seldom take responsibility for shortcomings. Human service organisations are likewise frequently preoccupied with defending, negotiating and regrouping in the face of exposed failures (Senate Standing Committee on Community Affairs 2004). Commentaries from within the organisation, such as Harris' (1998) on the failings of the Church Missionary Society with Indigenous people in Northern Australia, are exceptional.

It appears that human service organisations and managers rarely record and promulgate practice successes (eg Manela and Moxley 2002;

Rotheram-Borus and Duan 2003), so there is even less likelihood that they will declare their failures. They do not have ready access to safe and appropriate forums for engagement in these conversations, nor do they have traditions that promote such engagement (Patti 2003; Kennedy and Kennedy 2008).

At the professional level, the heterogeneity of the human service workforce dilutes professional identity, control and voice. No single professional or occupational group would wish to take responsibility for the litany of past and present wrongs. In Australia, this is a very real dilemma faced by the most recognisable professional group in the sector – social work – and the AASW, its professional association. Gillingham (2007) concludes that the AASW is not a force in social policy debates because of historical, cultural and structural factors, not the least of which is its small membership. Psychology, which might also claim a voice in and for the sector, has traditionally allied itself with health, standing apart from the rough and tumble of human service work, which is perceived to be lower status and professionally diffuse.

The AASW has not been moved to bid for the mantle of leadership of the entire human service arena, although it has recently staked its territorial claims publically in the context of broader concerns about child protection systems (eg see Australian Association of Social Workers 2008; Overington 2008). A so far unsuccessful public interest case for state registration of social workers has been launched by the AASW, which acknowledges that social workers can be harmful (Australian Association of Social Workers 2004). The case for registration recognises possible mental, emotional and financial risks to clients of inappropriate social work activity, and rather gingerly offers limited examples of social workers who have behaved unlawfully. In this, the AASW is caught in a bind. If it pronounces social workers as seriously dangerous it sabotages its own professional image, but minimising the potential for harm weakens its case for registration.

Its registration case is also somewhat disingenuous given that a much larger proportion of the human service workforce is not qualified in social work, yet it services the same clients and poses the same risks as social workers, and works alongside them in the same organisational and service systems. Sections of the workforce also share social work values and approaches (eg Hughes 2008). Other professional associations in the human service arena (eg Australian Institute of Welfare and Community Workers, Australian Counselling Association) lack the membership coverage, resources and legitimacy to even attempt the task of speaking for or representing the human services.

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While a great many of the activities of human service agencies and workers are regulated, workers themselves, apart from psychologists, are not. Thus, there are no registration boards and connected disciplinary processes to take a central position in professional life, promulgate worker misdeeds and malpractice, and help to embed and consolidate notions of adequate, inadequate and harmful practice. Registration does not prevent malpractice, as demonstrated by registered professions such as medicine and psychology, but it does raise the profile of malpractice and its consequences within a profession.

At the level of the individual worker, voices may be silent for many reasons. A few people do of course whistleblow in the face of systemic mishaps and misdeeds, but many are muzzled by legislative, contractual and employment-related prohibitions on speaking out. According to Franklin and Parton (1991), there is also a prevailing attitude and strategy, in United Kingdom social work at least, of keeping a low profile in the face of media reporting. It has been argued that well-documented feelings of powerlessness and helplessness in many human service workers (eg Bar-On 1995; Charles and Butler 2004) blind them to their potential for both positive and negative impact.

Galloway's (2005) analysis of Australian welfare workers' constructions of Aboriginal reconciliation is instructive in the context of individual voices – she suggests an individualised rather than a collective approach to social problems. Among her small group of research respondents, workers felt that they should not take responsibility for things past or for matters that they saw as the remit of government. As Lymbery (2004) and others have acknowledged, the distance between the ideal and the real is often appreciated by front-line workers, although they do not generally declare this publically or in any permanent form. There are institutional barriers to contributing actively to knowledge development (Healy 2005) and continuing education forums are not the norm in this arena (Barker and Branson 2000). Moreover changing imperatives within universities and professional exclusivity in social work have contributed to the demise of public intellectuals who speak out on social matters and act as 'the conscience of the nation' (Karger and Stoesz 2003 p. 65).

This book is positioned in that relatively unpopulated space in the human services where mishaps and misdeeds are scrutinised. It is about the role of the law in respect to the mishaps and misdeeds that comprise the shadow world. It holds a mirror before the human services so its actors, while still reaching out to the light, might recognise, confront, better understand and rise to the challenge of the shadow world. In the