

TAKING CHILDREN INTO CARE BY NON-JUDICIAL PROCESS IN SOUTH AUSTRALIA — SOME PROBLEMS

1. Introduction

One of the declared objectives of the South Australian Department for Community Welfare is

“to promote the welfare of the family as the basis of community welfare, to reduce the incidence of disruption of family relationships and to mitigate the effects of such disruption where it occurs.”¹

Regrettably, the family may fail to provide the emotional and physical security necessary for its members, adult and children. In such cases, positive intervention by the State Welfare authority may be the only way of repairing the breakdown and ensuring the well-being of the members of the family and, in particular, of any child involved. The form of intervention need not go so far as removing a child from his home or depriving parents of their guardianship rights. The Department for Community Welfare has developed a wide range of decentralized² services aimed to promote family welfare. These include family and individual counselling by trained staff, family support services (such as budgeting advice and community aides), child care service (such as family day care and congregate child care), financial assistance to persons in need, and the arrangement of care, treatment or placement of persons in need.³ Nevertheless, in some cases it may be necessary for the State Welfare authority to go further and assume responsibility for a child whose family environment is not conducive to his welfare. To this end, the Minister of Community Welfare in South Australia can assume legal rights of custody and guardianship over a child. Under s.39 of the Act, this may be achieved on a permanent basis by a process which is purely administrative in nature, involving no determination by a court of law. The Minister, if satisfied that a child may otherwise become neglected or uncontrolled may by order in writing place that child under his care and control.⁴ The making of this order vests rights of custody and guardianship in the Minister, to the exclusion of those of any other person.⁵ In exercising his power, the Minister is bound to treat the interests of the child as the paramount consideration,⁶ and to adopt a course calculated to

“secure for the child such care, guidance and (where necessary) correction, as will conduce to the welfare of the child and the public interest.”⁷

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1. Community Welfare Act, 1972-1975 (S.A.), s.7(b).

2. The Department's services are provided from bases known as District Offices which serve a specific geographical area. There are 29 such offices in South Australia, headed by a senior social worker known as the District Officer. He is responsible for a team of social work staff, the direction and management of Departmental services in his area, and the encouragement of community involvement in welfare activities. Within each office there is also a second senior social worker known as the Team Leader.

3. Community Welfare Act, 1972-1975 (S.A.), s.32.

4. *Id.*, s.39(2).

5. *Id.*, s.43.

6. *Id.*, s.42.

7. *Ibid.*

The discretion conferred on the Minister by s.39 is very wide. An order made under that section is an administrative act which has important consequences on legal rights of custody and guardianship. Safeguards — either from within the Department for Community Welfare or from outside — should exist to ensure that the Minister's power is not wrongly exercised. It is arguable that any non-judicial assumption of legal rights should be open to scrutiny by an independent judicial body. In this article, we shall first examine the problems associated with the operation of s.39 of the Community Welfare Act, and the alternative means (involving Juvenile Court proceedings) whereby children can be placed under the care and control of the Minister. Secondly, we shall consider some of the safeguards which may exist through proceedings in a court of law, and inquire whether they are adequate.

2. The Operation of s.39, Community Welfare Act, 1972-1975 (S.A.) in Practice

Where the removal of a child from home is desirable in the child's interest, but no question of removing guardianship from the parents arises, recourse may be had to s.32 of the Act. This section allows the Director-General of Community Welfare to provide assistance for such families or persons in need as he may determine. The type of assistance that can be offered includes financial help, commodities, the arrangement of care or treatment, and admission to a suitable home. The section is used at present to place destitute old persons in Magill Home, and to place children in Departmental cottage homes. A provision more commonly used for the temporary placement of children (either in times of family crisis or pending completion of longer term plans) is s.40.⁸ This gives the Minister of Community Welfare a discretionary power to receive a child into his care and control where, in his opinion, it would be in the child's interest. Under this section, a child is received into care and control for a maximum period of three months.⁹ It is unclear whether the s.40 process transfers rights of custody and guardianship from the parents to the Minister of Community Welfare. S.43 of the Act states that:

“While a child is under the care and control of the Minister, the Minister shall be entitled to the custody and guardianship of the child to the exclusion of the rights of any other person.”

This obviously applies to s.39, under which the Minister may, by order in writing, “place the child under the care and control of the Minister”.¹⁰ However, s.40 refers not to a child “under the care and control of the Minister”, but to a child “received into the care and control of the Minister”. An order made by the Minister under s.39 must be in writing. There is no such formality attached to the reception of a child into care and control under s.40. In practice, the reception of a child into care and control under s.40 is approved by the Regional Director,¹¹ and the approval may be given verbally in urgent cases. It seems highly undesirable that transfer of legal rights of custody and guardianship should be effected by so informal a process. S.40(6)(b) is in itself ambiguous. It states that a child shall be

8. See the Department for Community Welfare's Standard Procedure No. 512: “Section 40 Request—Temporary Care and Control”.

9. Community Welfare Act, 1972-1975 (S.A.), s.40(4).

10. *Id.*, s.39(2).

11. The Regional Director is a senior social welfare administrator responsible for the supervision of welfare service delivery in one of five geographical areas into which South Australia is divided.

discharged from the care and control of the Minister at any time prior to the expiration of the three-month period where the parent or guardian applies for the return of the child. This may appear inconsistent with the Minister having exclusive rights of custody and guardianship over the child. On the other hand it may be that the Minister has rights of custody and guardianship over the child until such a request is made: if s.40 did not transfer custody and guardianship rights, there would be no need for s.40(6)(b). Similar problems are posed by s.40(5). It is undesirable that the legal effect of the s.40 process should be unclear, given the large number of children admitted under this section.¹² Yet despite its ambiguities, s.40 is a valuable provision, enabling children to be removed from an unsatisfactory home environment for a temporary period, and permitting Community Welfare Workers¹³ to initiate case work designed to assist family reconciliation.

There are three¹⁴ principal ways in which the Department for Community Welfare can assume rights of long-term¹⁵ custody and guardianship over a child:

- (i) A juvenile court, upon finding that a child is a neglected or an uncontrolled child, or an habitual truant, may by order place the child under the care and control of the Minister of Community Welfare.¹⁶
- (ii) A juvenile court, having determined that a child under sixteen has committed an offence, may find the child to be in need of care and control, and by order place him under the care and control of the Minister.¹⁷ A young person between sixteen and eighteen against whom a juvenile court finds a charge proved may similarly be placed under the care and control of the Minister.¹⁸
- (iii) The Minister of Community Welfare may by order in writing place a child under his care and control, if he is satisfied that the child may otherwise become neglected or uncontrolled.¹⁹ This procedure is administrative in nature, involving no determination by a Court. It is with this procedure that this article is primarily concerned.

12. In 1975-1976, there were 209 admissions under s.40, and 191 releases. In 1976-March 1977, there have been 298 admissions. (These figures indicate the number of admissions; the same child may be admitted several times.) Figures supplied by the Research Branch of the Department for Community Welfare.

13. Community Welfare workers are social workers employed by the Department for Community Welfare. They are responsible to the District Officer, and as part of a professional team, their work includes the supervision of young offenders, and the promotion of community services such as family day care, family counselling, adoption and fostering.

14. There are two additional ways in which rights of guardianship can be assumed by the Minister of Community Welfare:

(i) where a child defaults in payment of a fine;

(ii) when guardianship is transferred from a welfare authority in another State to the welfare authority in this State: Community Welfare Act, 1972-1975 (S.A.), s.41.

15. It is normal practice for a child to be placed under the care and control of the Minister until he reaches the age of eighteen (but see Juvenile Courts Act, 1971-1974 (S.A.), ss.42(2)(c), 43(2)(d), 56(3)). The Community Welfare Act 1972-1975 (S.A.), s.48, allows some flexibility in the duration of an order; the Minister can apply to a juvenile court for an extension of the period during which an order remains in force.

16. Juvenile Courts Act, 1971-1974 (S.A.), s.56(1).

17. *Id.*, s.42.

18. *Id.*, s.43.

19. Community Welfare Act, 1972-1975 (S.A.), s.39(2).

The table below shows how children have been placed under the care and control of the Minister of Community Welfare for the first time in the last three years.²⁰

	July '74 to June '75	July '75 to June '76	July '76 to March '77
FROM THE JUVENILE COURTS			
Offenders - - - - -	125	134	70
Neglected - - - - -	57	25	29
Uncontrolled - - - - -	15	7	3
Truants - - - - -	19	13	6
ADMITTED UNDER SECTION 39 - - - -			
	18	18	23

Some comment on these figures is called for. The decline during 1975-1976 in the number of children appearing before the Juvenile Courts and found to be neglected or uncontrolled could be explained on two grounds. It may reflect an increased awareness on the part of the Department and the Juvenile Courts of the long-term effects of such complaints, and an increased use of the various preventive support systems available, such as fostering, placement in voluntary children's homes, and family counselling. The rise in the number of children found to be neglected between July 1976 and March 1977 could be explained by an increased vigilance in the reporting of instances of child abuse.²¹ The drop in the number of young offenders being committed to care and control between July 1976 and March 1977 may be a result of the care taken by Assessment Panels²² in the recommendations they make to the Juvenile Court. The increase in the number of children admitted to care and control under s.39 of the Act over the same period may show a preference on the part of Assessment Panel staff and Community Welfare Workers for the administrative procedure — a preference perhaps shared by the Minister himself.

S.39 of the Act states:

- “(1) A parent, guardian, or person having the custody, of a child may apply in the prescribed form to the Minister for an order that the child be placed under the care and control of the Minister.
- (2) The Minister may, if satisfied that the child may otherwise become neglected or uncontrolled, by order in writing, place the

20. Figures supplied by the Research Branch of the Department for Community Welfare.

21. See Report of the Community Welfare Advisory Committee, “Enquiry into Non-Accidental Physical Injury to Children in South Australia” (Adelaide, 1976).

22. The Community Welfare Act, 1972-1975 (S.A.), s.58(2) gives the Minister authority to “establish such assessment centres as he thinks necessary for the examination of children, the evaluation of their personal circumstances and social background, and the assessment of the most appropriate treatment of rehabilitative correction or education for each child”. There are 16 such Centres in South Australia—6 in metropolitan Adelaide, 10 in country areas—staffed by multi-disciplinary teams of professionals, including social workers, psychologists and teachers. Referrals to Assessment Panels come from the Juvenile Courts, Juvenile Aid Panels, social workers within the Department for Community Welfare and voluntary and state agencies.

child under the care and control of the Minister for any period expiring on or before the day on which the child attains the age of eighteen years.”

Such an order cannot normally be made without the consent of both parents in the case of a child born within marriage.²³ In the case of a child born outside marriage, the natural father’s consent is in certain circumstances required in addition to that of the mother.²⁴ Exceptionally, if the whereabouts of a parent cannot after “reasonable inquiry” be ascertained, an order can be made without parental consent.²⁵ In the case of a child over fifteen, the child’s own consent is a pre-requisite to the making of an order.²⁶

The making of an order under s.39 has important effects on legal rights. Once a child has been placed under the care and control of the Minister, the Minister is “entitled to the custody and guardianship of the child to the exclusion of the rights of any other person.”²⁷ Legal rights are thus transferred by a process which is administrative in its nature. The present system does not permit the Department for Community Welfare to place a child under care and control without removing guardianship rights from the parents, a step which may well be destructive of the parent/child relationship. This central question is explored later; is the removal of guardianship and all it implies conducive to eventual family reunion? This enquiry is even more pertinent in view of s.7(b) of the Community Welfare Act.²⁸

Community welfare workers who have the daily responsibility for the care of children and the support of families often find themselves with a problem when it seems necessary to remove a child from his own home but where the child has committed no offence. A child who has committed an offence may be brought before a juvenile court, found by that court to be in need of care and control, and placed under the care and control of the Minister for Community Welfare.²⁹ The Director-General may then place the child in a Departmental facility.³⁰

It is worth noting that children charged with relatively minor offences, and who would have been dealt with by a Juvenile Aid Panel³¹ had their home circumstances been different, are sometimes brought before the Juvenile Court on the recommendation of the Juvenile Aid Panel in order to obtain the care and control order necessary for their future welfare. This can and does happen when a child over the age of 15 or his parents have been reluctant to sign

23. *Id.*, s.39(3), as substituted by Community Welfare Act Amendment Act (No. 2), 1975, s.4.

24. *Id.*, s.6(3), as substituted by Community Welfare Act Amendment Act (No. 2), 1975 (S.A.), s.3(f).

25. *Id.*, s.39(4).

26. *Id.*, s.39(5).

27. *Id.*, s.43.

28. *Supra*, n.1.

29. Juvenile Courts Act, 1971-1974 (S.A.), s.43. In one (unreported) case before the Juvenile Court in Adelaide, the presiding judge commented that it was rare for a care and control order to be made in respect of a child who had committed only a trivial offence, although he supported the order in view of the child’s welfare. He asked whether a complaint that the child was uncontrolled might have been more appropriate. In another case involving a first offender, who was an orphan, the Assessment Panel recommended to the Juvenile Court that the charge be dismissed and an order made under s.39 of the Community Welfare Act. This suggestion was accepted by the Juvenile Court.

30. Community Welfare Act, 1972-1975 (S.A.), s.44.

31. A Juvenile Aid Panel is a non-judicial childrens’ hearing, held in an informal setting. See Juvenile Courts Act, 1971-1974 (S.A.), ss.7-16.

an application under s.39 of the Community Welfare Act.³² It is open to question whether children already disadvantaged by circumstances beyond their control should be subjected to this court procedure.

Where a child has committed no offence, community welfare workers are faced with a choice between procedures. Either a complaint may be laid alleging that a child is a neglected or uncontrolled child (both of which involve proceedings before a juvenile court),³³ or recourse may be had to the administrative procedure under s.39 of the Act. If the former is chosen complications may arise from the very general definition of "neglected" or "uncontrolled". The Act states that a "neglected" child is one who:

- "(a) is under the guardianship of any person whom the court considers unfit to have the guardianship of a child;
- (b) has apparently no sufficient means of support, and whose guardians or near relatives are unable or unwilling to maintain him or are dead or unknown or cannot be found or are not in the State or are detained in a prison or home;
- (c) has no guardian, or is not cared for or maintained adequately, or is ill-treated by his guardian and in need of care."³⁴

An "uncontrolled" child is a child . . .

- "(a) whose parents or guardians appear to be unable or unwilling to exercise adequate supervision and control of the child;
and
- (b) who is in need of care and control."

The lack of further definition of these terms is explicable by the need to cater for a wide range of cases. It can be contrasted with the precision with which an offence (such as illegal use) can be defined. The writers are aware that the present statutory definitions replaced more lengthy and complicated ones. Criticism can be levelled not at the wording of the Act itself, but at the lack of Departmental guidelines for its interpretation and application.

The Department for Community Welfare's Standard Procedure on Neglected and Uncontrolled Children attempts to provide guidance, but there is no further specification of what is meant by an "uncontrolled" child. The Standard Procedure points out that "no absolute standards can be set down as criteria for neglect", and that "it may be necessary to use different criteria according to different social environments".³⁶ There are obvious situations which demand immediate Departmental action—*e.g.*, where the child is abandoned or physically abused. But what of the less well-defined problem of emotional neglect? The concept of emotional neglect is introduced in the Standard Procedure, which states that:

32. In one case, a fifteen year old boy appeared before the Juvenile Aid Panel after he had stolen a bicycle. The case was referred to the Assessment Panel, as a care and control order was envisaged (which demanded mandatory assessment: Juvenile Courts Act, 1971-1974 (S.A.), s.41). The Assessment Panel was reluctant to support such a course of action on a trivial offence and considered the use of s.39 of the Community Welfare Act, 1972-1975 (S.A.). The boy refused to consent to the making of the order (as required by s.39(5)), and so the Juvenile Aid Panel referred the case to the Juvenile Court.

33. Juvenile Courts Act, 1971-1974 (S.A.), s.56.

34. Community Welfare Act, 1972-1975 (S.A.), s.6(1).

35. *Ibid.*

36. Department for Community Welfare's Standard Procedure No. 506, "Neglected or Uncontrolled Children", s.1.4.

“A social worker’s natural reluctance to initiate a complaint should not blind him to the possibility that leaving a child in grossly unsatisfactory conditions may permanently retard his physical and/or emotional growth.”

But the Standard Procedure goes on to state that “a complaint should be considered only where a situation is seriously detrimental to a child’s physical and/or emotional or intellectual development”.³⁷ The emotional and psychological components of neglect are obviously harder to assess and to prove than the more obvious manifestations of physical neglect.

The usual outcome of a complaint that a child is neglected or uncontrolled is that the child is removed from his home. It is accepted that the permanent disintegration of the family unit could well result, although community welfare workers are encouraged “to look forward to continuing case-work with the family in the hope that eventually the child will be returned to his parents as part of an effective family unit”.³⁸ Laying a complaint, it continues, “may in some circumstances be not only necessary for the child’s protection, but a learning experience for the parents”.³⁹

The primary concern for the interests of the child and the desire to preserve the stability and integrity of the family may not always be compatible. A child who appears before the Juvenile Court on a complaint that he is uncontrolled may be reacting to family tensions. As a result the child may come to the notice of one of the various agencies of social control (for example, schools, Department for Community Welfare, police courts). The consequent corrective action can often have an opposite effect to that intended. The child or the family can be labelled as being bad or inadequate, and separated from each other in a way which is not conducive to eventual reunion.⁴⁰

While it may be argued that the aim is to help the family cope with its particular problems and thereby, in the words of the Community Welfare Act, “to reduce the incidence of disruption of family relationships and to mitigate the effects of such disruption when it occurs”,⁴¹ the method adopted generally works against this aim. It does this by separating parents and child, removing guardianship responsibilities from the former and stigmatising both.

37. *Ibid.*

38. *Id.*, s.1.6.

39. *Ibid.*

40. This happened in one case involving a seven year old boy appearing before the Juvenile Court on a complaint alleging that he was an “uncontrolled” child. His family background was most unhappy and disturbed and his mother depressed and guilty about past events, and emotionally torn between her son and the man with whom she was living. The behaviour the child exhibited at home (excessive masturbation and soiling, disobedience) reflected his anxiety, but was punished by physical chastisement. The consequent bruising and the child’s soiled clothing brought him to the notice of school staff who advised the Department for Community Welfare and the Adelaide Childrens’ Hospital. Investigations were carried out, and a neglect complaint considered. This was later changed by the Department to a complaint that the child was “uncontrolled”. This was found proved by the Juvenile Court and the matter was then referred to the Assessment Panel, which suggested an order under s.39 as an alternative to court action. The child’s mother refused to consent to the making of the order. As the child was considered to be at risk if returned to his home, the Juvenile Court placed the child under the care and control of the Minister. The investigatory process involved in this case rendered subsequent meaningful casework with the family impossible. See the comments made in the Report of the Community Welfare Advisory Committee, “Enquiry into Non-Accidental Physical Injury to Children in South Australia” (Adelaide, 1976), 48-53.

41. Community Welfare Act, 1972-1975 (S.A.), s.7(b).

Community welfare workers wanting advice on care and control decisions can seek guidance from senior social workers within their District Office, who are expected to exercise initiative and discretion in such matters. In addition they can, and in some cases must, utilize the Department's Assessment Centres. Here panels of experienced professionals from various disciplines prepare a detailed report which provides a thorough and independent evaluation of a child's family's needs, and makes specific recommendations for treatment designed to meet those needs. Those recommendations concern the child, his family, and possibly others such as his peers, or his school. They may suggest the most appropriate court order and pinpoint the need for new facilities and programmes to be made available to the child. The Assessment Panel's analysis is mandatory before a child is placed under the care and control of the Minister by the Court, either following determination that the child has committed an offence if he is under 16; or if he is over 16 and charged with an offence.⁴² A report from an Assessment Centre is also mandatory before an order is made with respect to an uncontrolled child.⁴³ Children appearing on complaints alleging neglect do not have to be assessed, neither do children for whom a s.39 order is the agreed means of securing care and control. The reasons for these inconsistencies are not stated.

Assessment Panels are regularly consulted about the appropriateness of a care and control order, and more specifically, if one is necessary, are asked to advise on what process should be adopted to place a child under the Minister's care and control. Their reservations about proceeding with complaints alleging that a child is neglected or uncontrolled and the reasons for their preference for the non-judicial process under s.39 of the Act can be stated thus:

- (i) There is sometimes insufficient evidence to support a complaint, notwithstanding that a child's separation from his family is necessary.⁴⁴
- (ii) Both complaints stigmatise the child who is the one charged with being neglected or uncontrolled. It is not the parents who are charged with neglecting or not controlling. This emphasis, it can be argued, is contrary to the philosophy of the Juvenile Courts Act, which states that the interests of the child are paramount.⁴⁵
- (iii) Complaints alleging that a child is neglected or uncontrolled reinforce parental inadequacy, and can, as we have stated, defeat the purpose of helping the family resolve its problems by subjecting parents to a court experience, which may be traumatic.
- (iv) Proceedings involving a complaint that a child is neglected or uncontrolled, however sensitively handled, subject the child to a court experience. Courts are associated with crime and punishment

42. Juvenile Courts Act, 1971-1974 (S.A.), s.44.

43. *Id.*, s.56(4).

44. In the case referred to *supra*, n.39, the Assessment Panel did not support the complaint alleging that the child was uncontrolled, arguing that there was insufficient evidence and that the child's behaviour was an anxiety reaction to an intolerable home situation. This can happen when a complaint brought by the Department alleging that a child is uncontrolled is found proved by the Juvenile Court and then referred to the Assessment Panel before an order is made. As a result the Assessment Panel can find itself in opposition to a course of action taken by other members of the Department of which it is a part.

45. Juvenile Courts Act, 1971-1974 (S.A.), s.3.

and the child's perception of what is happening can be quite different from that of the professionals involved.⁴⁶

The impact of such complaints may be fully realised only when the child grows older and the inherent implications of once having been a neglected or uncontrolled child are felt. "Uncontrolled" and "neglected" children are, as we have explained, either the helpless victims of parental inadequacy, or, in the latter case, may be without parents or guardians at all.

These are the most often stated reasons for Assessment Panels recommending the use of s.39 in preference to the laying of a complaint before a Juvenile Court. It is interesting to note that the Department for Community Welfare's advice on the use of s.39 stresses none of the positive benefits of taking children into the Minister's care and control by means of a non-judicial process, and in fact favours court proceedings. Its Standard Procedure on the use of s.39 states:⁴⁷

"The use of Section 39 should not be regarded as a simple alternative to Court action for the following reasons:

- 1.1 Court action protects the parent and the child against an administrative procedure which is not subject to outside scrutiny. Appearance before a Court ensures an independent enquiry which is bound by judicial principles, and at which legal defence is possible. Even if the parents do not appreciate the distinction, the Worker⁴⁸ should ensure that their rights are protected. The child also has rights which need protection.
- 1.2 As the loss of legal rights is involved, parents need to be fully aware of the implications. It is not generally desirable that the Department, which has been involved in the situation and will have a continuing involvement, should also be involved in the decision as to whether the legal rights of parents concerning their children should be relinquished.
- 1.3 Signing the application under Section 39 may have later repercussions for both parents and child. Parents may feel they condoned the action too readily and/or under pressure. This could be a natural result of guilt feelings. The child on the other hand, may feel resentful to parents for having made the application, or suspicious towards the Department.
- 1.4 Court appearance has the effect of making it clear to all involved as to what is going on and why. As the Worker will be subject questioning as a witness, it also ensures that recommendations are not made lightly. While a Court appearance may cause distress, the manner in which the situation is handled by the Worker is very important."

In what circumstances (apart from those agreed on independently by Assessment Panels as a result of their involvement with complaints that children

46. The Juvenile Courts Act, 1971-1974 (S.A.), s.58(1) states that a child who is alleged to be neglected or uncontrolled should not be seen as having committed an offence. *Quaere* whether this is appreciated by children themselves, who may see the court as an instrument of punishment.

47. Department for Community Welfare's Standard Procedure No. 511, "Applications under s.39 of the Community Welfare Act by Parents/Guardians for a Child to be Received into Care and Control", ss.1.1-1.4.

48. See *supra*, n.13.

are neglected or uncontrolled) does the Department support the use of s.39? The Standard Procedure states three instances:⁴⁹

- “2.1 In the case of babies who would have been placed out for adoption had there not been some obstacle to adoption.⁵⁰
- 2.2 Where the normal conduct of parents is consistent with acceptable child care practices, but very special circumstances have meant that in this particular case they are unable to cope with the situation.
- 2.3 Where a child has been successfully cared for by persons other than parents, e.g. through the agency of a private Children’s Home, but where breakdown occurs, parents are dead or their whereabouts unknown, and the agency no longer wishes to accept responsibility.”

Criticism has already been levelled at the inadequate definition of what is a neglected or an uncontrolled child, but there is a similar vagueness in s.2.2 above. What is “normal” conduct? What are “acceptable child care practices”, bearing in mind the warning given to Community Welfare Workers in the Department’s Standard Procedure on Neglected and Uncontrolled Children?⁵¹ What are “very special circumstances”? Once again, it is the Community Welfare Worker who has to assess a situation and decide whether or not to proceed with a complaint that a child is neglected or uncontrolled, or with a s.39 application. His confusion is understandable, when he may feel that court proceedings are preferable, but be instructed to explore other alternatives first.⁵²

If procedure under s.39 of the Act is felt to be appropriate (either for the reasons stated in the Department’s Standard Procedures or because there is insufficient evidence to found a complaint that a child is neglected or uncontrolled), all that is required is a discussion with the District Officer,⁵³ and if necessary with the Regional Director.⁵⁴ A report under the Regional Director’s signature is then forwarded to the Director-General of Community Welfare. This report contains identifying information about the child and family, details of family circumstances (including reasons why an application under s.39 is preferable to court action), proposed future plans, and medical or other details which are essential information for whoever has the child’s custody. Any detailed analysis of the child’s needs (emotional, social, physical, educational) and how they would best be met is incidental, for as in the case of children who are placed under the Minister’s control on complaint of being neglected, there is no mandatory assessment. This is surprising, given that it is the Minister himself who must approve or reject applications under s.39, which indicates the caution with which the Department for Community Welfare views them. This caution is not misplaced, for such an administrative process may be open to abuse.

Further practical problems may arise in the operation of s.39. A child over the age of fifteen whose consent is a prerequisite to the making of an order may

49. Department for Community Welfare’s Standard Procedure No. 511, ss.2.1-2.3.

50. Figures supplied by the Department’s Adoption Branch show that 8 children were admitted in these circumstances in the year 1974-1975, 2 in the year 1975-1976, and 1 to the end of June 1977. The decrease may reflect the increased number of parents wishing to adopt.

51. *Supra*, n.36.

52. *Id.*, s.1.3.

53. See *supra*, n.2.

54. See *supra*, n.11.

be mentally retarded and unable to comprehend what he is signing.⁵⁵ How can the rights of such a child be protected? Similarly, retarded parents can be required to consider giving their consent to the making of a s.39 order in respect of their child. They too may fail to appreciate the implications of their actions. One final oddity arises where a child under fifteen has a child of her own. She is not required to consent to the making of a s.39 order in respect of herself, but her consent is a pre-requisite to the making of an order in respect of her child.⁵⁶

Finally, whatever process is used to secure a care and control order over a child depends for its success on the competence of those involved, and in particular, that of the Community Welfare Worker. The wording of the Community Welfare Act is not without ambiguity. We have noted the lack of detailed criteria for "neglected" and "uncontrolled" children. If the working knowledge of Community Welfare Workers and social administrators is insufficient, there is an increased probability of the various processes being incorrectly applied, or decisions not being taken.

3. Legal Safeguards

An order made under s.39 transfers all rights of custody and guardianship from the parents of a child to the Minister.⁵⁷ It is desirable that there should be external legal safeguards to which an interested party who objects to the making of an order may have recourse. Such safeguards are best provided by independent proceedings in a court of law. To cover the rare case where Ministerial discretion has been improperly exercised, the courts should have jurisdiction to review the making of an order placing a child under the care and control of the Minister. But this jurisdiction should be sparingly exercised. The Community Welfare Act creates a comprehensive system of child welfare services operated by a specialized Department whose officers have professional skills. The operation of the system must not be impeded by too much interference from judicial bodies with little or no expertise in this field. In this section, we shall examine the role played by the courts and ascertain whether

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55. This situation arises regularly with boys who are placed for safe-keeping and assessment at Lochiel Park, a Departmental facility specializing in the care of mildly retarded boys. These children have sometimes been assessed by the Intellectually Retarded Services, and may be retarded to such an extent that they will always require dependent care. Such children may have been declared unsuitable for the treatment or placement facilities provided by Intellectually Retarded Services. The procedure under s.39 is often used for such children in preference to court proceedings.
56. In a recent case, the Department considered laying a complaint alleging that a fourteen year old mother was neglected. The baby was being poorly cared for, and the use of s.39 in respect of the baby was discussed with the young mother. She did not comprehend the issues involved. Her consent would not have been required for the making of an order in respect of herself, yet would have been required for the making of an order for her baby.
57. Community Welfare Act, 1972-1975 (S.A.), s.43. See too s.44:
 "Subject to this Act, the Director-General may deal with the child under the care and control of the Minister in any of the following ways—
 (a) he may place the child, or permit the child to remain, in the care or custody of a parent, near relative or guardian of the child;
 (b) he may place the child in the care or custody of an approved foster-parent or other suitable person;
 (c) he may, subject to this Act, direct that the child be placed in any home established or licensed under this Act;
 (d) he may, if it is necessary for the sake of the physical or mental health of the child, place the child in any hospital, receiving house or mental hospital; or
 (e) he may otherwise deal with the child as the circumstances of the case require".

the correct balance is struck between too much and too little judicial intervention in this aspect of child welfare services.

(A) COMMUNITY WELFARE ACT, 1972-1975 (S.A.), s.49

The Community Welfare Act itself contains one safeguard. An order placing a child under the care and control of the Minister for Community Welfare can only be made at the instigation of a parent, guardian or other person having the custody of the child,⁵⁸ and only with the consent of the parents of the child.⁵⁹ Parental consent is thus a pre-requisite of the assumption of legal rights over the child by the Minister. However, it is possible that, on reflection, the parents may feel that they should not have consented to their child being taken into care and control; they may, after the order under s.39 has been made, wish to withdraw their consent. A procedure whereby the order can be discharged in such circumstances is built into the Act itself. S.49(2) provides that:

“A parent of a child who is under the care and control of the Minister may apply in the prescribed form to the Minister for an order that the child be discharged from the care and control of the Minister.”

However, such an application may be refused by the Minister. In that case, the Act provides for an appeal to be made to the juvenile court.

“Where such an application has been duly made . . . and the application has been refused, the applicant may . . . appeal to a juvenile court constituted of a judge against that refusal.”⁶⁰

The juvenile court may then order that the child be discharged from the care and control of the Minister.⁶¹ The Act expressly states that the juvenile court shall make its decision according to what it considers to be the best interests of the child.⁶² The Act itself thus provides a safeguard, permitting scrutiny by an independent judicial body, whose sole concern is with the child's welfare.

Acting in the light of what it considers to be the best interests of the child, the juvenile court may refuse to discharge the care and control order. In this case, the order made under s.39 remains in force, and the Minister of Community Welfare retains exclusive rights of custody and guardianship over the child,⁶³ despite the objections of the parents. A fresh appeal cannot be made by a parent until the expiration of one year.⁶⁴ Parental rights are thus subordinated to the consideration of the child's welfare. The debate on the balance to be struck between parental rights and the welfare of the child, where the two are in conflict, is a long-standing one, but the trend of modern legislation in Australia is to come down firmly on the side of the child's welfare.⁶⁵

We will now consider situations beyond the scope of s.49 of the Act. The parents, who originally consented to the making of a s.39 order in respect of their child, may at a later stage become dissatisfied with the Department's

58. *Id.*, s.39(1).

59. *Id.*, s.39(3).

60. *Id.*, s.49(3).

61. *Id.*, s.49(7).

62. *Id.*, s.49(6).

63. *Id.*, s.43.

64. *Id.*, s.49(4).

65. *E.g.*, Family Law Act, 1975-1976 (Cth.), s.64(1) (a); Adoption of Children Act, 1966-1975 (S.A.), s.9; Guardianship of Infants Act, 1940-1975 (S.A.), s.11.

mode of dealing with the child, or may simply change their minds and wish the order to be discharged. If their application to the Minister under s.49 of the Act fails, and the juvenile court rejects their appeal from that decision, the parents have exhausted the avenues open to them under the Act itself. Is there any other possible remedy available to them? The person objecting to the making of a care and control order in respect of a particular child, or to the Department's subsequent dealing with the child, need not necessarily be a parent. A more distant relative, such as a grandparent or an aunt, may be concerned about the course which has been adopted for the child. Persons unrelated by blood to the child may also object to the child being placed under the care and control of the Minister for Community Welfare, or to the Department's dealing with that child. Foster-parents, or social workers themselves, might be interested parties in this context. Parties other than the parents of a child cannot avail themselves of the procedure contained in s.49. Are there any independent legal remedies to which they can have recourse if they feel that the Department for Community Welfare is not doing the best for the child's welfare?

Two further legal safeguards may exist. Neither of these has yet been used in South Australia, and indeed their very existence is not free from doubt. The first independent safeguard on the Department for Community Welfare's exercise of its powers under ss.39, 43 and 44 of the Act lies through proceedings taken in a court of law (either the Family Court of Australia⁶⁶ or the Supreme Court of South Australia⁶⁷) to have the issue of rights of custody and guardianship over the child determined by independent judicial process. The second possible safeguard is to invoke the jurisdiction of the Supreme Court of South Australia to review administrative action through proceedings for one of the administrative law remedies such as mandamus or a declaration.

(B) INDEPENDENT CUSTODY PROCEEDINGS IN A COURT OF LAW

A parent of a child born within marriage⁶⁸ who has failed to obtain the discharge of a care and control order by proceeding under s.49 of the Community Welfare Act can take proceedings in the Family Court of Australia to obtain the custody of the child under the Family Law Act, 1975-1976 (Cth.). A parent of a child born outside marriage or a third party dissatisfied with the making of a care and control order in respect of any child, or with the Department's dealings with the child, may be able to take proceedings in the Supreme Court of South Australia, either under the Guardianship of Infants Act, 1940-1975 (S.A.), or by invoking the court's inherent wardship jurisdiction, to have the issue of the child's custody determined by the court. In all custody proceedings, the court must act in accordance with the principle that the welfare of the child is the first and paramount consideration.⁶⁹ These independent custody proceedings can thus provide an opportunity for scrutiny by a judicial body of the Department for Community Welfare's action in respect of a child. The court may come to a different conclusion from the Minister as to who should have custody rights over the child. However, difficult jurisdictional questions are raised here. Once a child has been placed under the care and control of the Minister by administrative process under s.39, exclusive rights of custody and guardianship over that child are, according

66. Under the Family Law Act, 1975-1976 (Cth.), s.64.

67. Either under the Guardianship of Infants Act, 1940-1975 (S.A.), s.6, or by invoking the inherent wardship jurisdiction of that court.

68. Family Law Act, 1975-1976 (Cth.), s.5(1).

69. Family Law Act, 1975-1976 (Cth.), s.64(1)(a); Guardianship of Infants Act, 1940-1975 (S.A.), s.11(1).

to s.43 of the Act, vested in the Minister "to the exclusion of the rights of any other person". Do the provisions of the Act then deprive the ordinary courts of jurisdiction to entertain custody proceedings in respect of a child over whom a care and control order has been made? Is the making of a s.39 order conclusive as to custody and guardianship rights of a child until the order is discharged by the Minister, or can a court in effect override the order by awarding custody to a person other than the Minister while the order is still purportedly in force? If the former were true, then an ultimate legal safeguard over the child's welfare would be absent.

(i) *Proceedings Under the Family Law Act, 1975-1976 (Cth.)*

Where a husband or wife or both seek custody of a child of their marriage,⁷⁰ the proceedings are governed by federal law (the Family Law Act, 1975-1976 (Cth.)), and must usually be instituted in the Family Court of Australia.⁷¹ It makes no difference whether or not divorce proceedings have also been instituted.⁷² Under the Act, the welfare of the child is the paramount consideration.⁷³ The basic question is how this jurisdiction of the Family Court operates when the child in question is subject to a care and control order under s.39 of the Community Welfare Act.

Difficult problems of the relationship between federal and State jurisdictions are involved here. Under the Matrimonial Causes Act, 1959-1966 (Cth.), the point was not clearly determined. Custody proceedings by husband or wife came within that Act if brought in conjunction with ("ancillary to") proceedings for "principal relief" (usually, divorce). By contrast, custody proceedings taken independently of divorce proceedings had to be taken in a State magistrate's court. The jurisdiction of these State courts to make custody orders in independent proceedings was expressly preserved by s.8(3) of the Matrimonial Causes Act. However, s.8(4) of the Act provided that once a marriage was dissolved or annulled by a court with federal jurisdiction, any custody order made by a State magistrate's court ceased to have effect.

*Horsey v. Horsey*⁷⁴ raised the question whether s.8(4) of the Matrimonial Causes Act applied to an order which placed a child under the care and control of the (Tasmanian) Director of Social Welfare. In that case, Mr. and Mrs. Horsey had ten children; nine of these were charged before a children's court with being "neglected children" under s.32 of the Child Welfare Act, 1960 (Tas.).⁷⁵ The children's court declared the children to be wards of the State under s.34(1) of the Act; s.46 of the Act provided that the Director of Social Welfare was guardian of the children to the exclusion of all other guardians. Mr. Horsey later petitioned for divorce on the grounds of his wife's adultery. If the Supreme Court of Tasmania exercising federal jurisdiction under the Matrimonial Causes Act granted Mr. Horsey his divorce, did s.8(4) of the Act mean that the children ceased to be under the guardianship of the Director of Social Welfare under the Child Welfare Act, 1960 (Tas.)? The

70. *Id.*, s.5(1).

71. *Id.*, s.39. Some custody jurisdiction under the Family Law Act., 1975-1976 (Cth.) is also exercised by courts of summary jurisdiction invested with federal jurisdiction: *id.*, s.39(6).

72. See paragraph (c) of the definition of "matrimonial cause" in s.4(1) of the Family Law Act, 1975-1976 (Cth.).

73. *Id.*, s.64(1)(a).

74. (1965) 7 F.L.R. 209.

75. The South Australian equivalent is the procedure under the Juvenile Courts Act, 1971-1974 (S.A.), s.56.

Full Court of the Supreme Court of Tasmania (Burbury C.J., Crawford and Neasey JJ.) answered this question in the negative.

A further question put to the Full Court was whether the court granting the divorce could award custody to a parent of a child who was a ward of the State? In other words, could the court granting the divorce (a court of federal jurisdiction) remove a child from the guardianship of the Director for Social Welfare, and place it in the custody of one of its parents, thus overriding the order made under s.34(1) of the Child Welfare Act, 1960 (Tas.)? It was not necessary for the Full Court to decide this question in the case before it, and the issue was left open. However, Burbury C.J. considered it to be a question "of importance and difficulty", involving "a clash between Commonwealth and State legislation".⁷⁶ It must be noted that *Horsey v. Horsey* concerned children placed under the guardianship of the Director of Social Welfare by an order of the children's court, and not by a procedure purely administrative in its nature, of the type provided under s.39 of the Community Welfare Act, 1972-1975 (S.A.). An equivalent procedure was provided by s.35 of the Child Welfare Act, 1960 (Tas.).

The Family Law Act, 1975 (Cth.) has provided no simple solution to these problems. The interpretation of s.10 has given rise to difficulties. Sub-s.(1) provides that the Family Court of Australia shall not make a custody order in respect of a child who is under the care and control of a Minister of a State, "subject to sub-s.(3)". Sub-s.(2), in its original form, stated that "[n]othing in the Act and no decree under this Act" should affect the jurisdiction of a court or the power of an authority under State law to make an order or take any action in relation to such a child. Sub-s.(3) gives the Family Court jurisdiction to make an order under sub-s.(1) "if it is satisfied that there are special circumstances which justify the making of the order".

The intention of the legislature may have been to enable the Family Court, in "special circumstances", to make a custody order which overrides the State care and control order. Difficult constitutional issues are raised here. The validity of s.10 was challenged recently in *Re Demack; ex parte Plummer*.⁷⁷ A child was placed by the Children's Court under the guardianship of the Director of the Department of Children's Services in Queensland, pursuant to s.64 of the Children's Services Act, 1965 (Qld.). The mother later applied to the Family Court of Australia for custody of her child. Her husband also sought custody. The Director was treated as a party to these proceedings and submitted that the Family Court had no jurisdiction to hear the mother's application. Demack J. rejected this submission,⁷⁸ whereupon the Director sought a writ of prohibition to restrain the Family Court from exercising jurisdiction. The Director argued that s.10 is *ultra vires* the Commonwealth Parliament. His argument assumed that s.10(3) gives the Family Court power to override the State care and control order, thus enabling the Family Court to remove a child from the Director's custody. This, it was argued, goes beyond the "marriage" power in s.51(xxi) of the Constitution, since it relates to rights not of husband and wife but of the State authority.

The High Court (Barwick C.J., Gibbs, Mason, Stephen, Jacobs, Murphy JJ.) unanimously refused the Director's application. The court's interpretation

76. (1975) 7 F.L.R. 209, 216, 218.

77. (1977) F.L.C. (CCH) 90-244.

78. (1976) 50 A.L.J. 420.

of s.10 enabled it to sidestep the constitutional issue. It held that the Family Court's custody order does not override the rights of the Director; such an order merely determines the rights as between husband and wife, without affecting the rights of the Director. Each member of the Court read sub-s.(2) as absolute in its statement that "Nothing in this Act . . . shall affect" any other made under State law. As Stephen J. said:⁷⁹

"The Family Court's exercise of jurisdiction under s.10 will be confined to a determination of custodial rights as between husband and wife; that determination will necessarily be subject to the Director's prior right to custody, and will only have operative effect if Y should at any time cease to be in the custody of the Director."

The absurdity of this was pointed out by Barwick C.J.:⁸⁰

"The result of the case, having regard to the terms of s.10(2) of the Act, cannot be said to be satisfactory. That section creates the absurdity of two antithetical orders for custody of the same child being valid and operative at the same time."

It is highly questionable whether the drafters of s.10(3) intended it to have this limited effect. After the application in *Demack's* case was made, but before it was heard by the High Court, Parliament passed the Family Law Amendment Act (No. 2), 1976 (Cth.),⁸¹ in an attempt to clarify the situation. S.3 of the amending Act inserts the words "Subject to sub-s.(3)" as a preface to sub-s.(2). The High Court held that it was unnecessary in deciding the case before it to interpret s.10 as amended. However, Stephen, Gibbs and Mason JJ. said *obiter* that their interpretation of s.10 would be unaffected by the amendment. Their reasons for this were not made clear. With respect, the *dicta* are misconceived. The addition to sub-s.(2) cannot have been intended by Parliament to be mere surplusage. The exclusionary language of sub-s.(2) is now expressly made "subject to sub-s.(3)."

The result of the High Court's decision in *Demack's* case is hardly satisfactory. It is at least arguable that the interpretation of s.10 in its original form is incorrect. Even more questionable are the *dicta* on the interpretation of the section as amended. The decision relegates orders made by the Family Court under sub-s.(3) to a largely academic exercise. It is submitted that the Court's interpretation of s.10 is incorrect. It should have held that the intention of s.10(3) is that a custody order made by the Family Court in "special circumstances" should override the State order, and thus faced the constitutional issue squarely. The constitutional problem here admits of no simple solution, but little is to be gained by avoiding it through strained construction of the statutory provision.

Can the Commonwealth Parliament legislate to give the Family Court power to override a care and control order made under State law? Although it was unnecessary to decide this in *Demack's* case, Masjon J., *obiter*, gave an affirmative answer. He said:⁸²

"The marriage power extends to the definition of, and the enforcement of, the rights of the parties to a marriage, including their rights in respect of the custody of the children of the marriage . . . The exercise

79. (1977) F.L.C. (CCH) 90-244; 76, 317.

80. *Id.*, 76, 311.

81. No. 95 of 1976.

82. (1977) F.L.C. (CCH) 90-244; 76, 314-315.

of the power cannot be restricted to a definition of . . . the custodial rights of the parents *inter se*. It follows that the Parliament may in the exercise of the marriage power enact a law providing that custodial rights of the parent of a child shall be paramount and that they shall prevail over the rights of any other person, whether he be a Minister or officer of the State or not.”

Murphy J. would agree with him.⁸³ However, Gibbs J.⁸⁴ doubted the constitutional validity of s.10(3) if, on its proper construction, it had given the Family Court an overriding power. Barwick C.J., Stephen & Jacobs JJ. expressed no opinion on the constitutional issue. If s.10 as amended were interpreted to have an overriding effect and to be *ultra vires* the constitutional power of the Commonwealth Parliament, an ultimate judicial safeguard over an administrative process affecting the rights of children of a marriage would be absent. On the other hand, it could be argued that this result would be satisfactory, since the Family Court cannot be in a better position to determine what is in the best interests of a child's future than the officers of a State welfare authority who are specialists in this field and have had the benefit of a detailed study of the child's problems.

(ii) *Custody Proceedings in State Courts*

The question whether the making of an order placing a child under the care and control of a Minister ousts the jurisdiction of an ordinary court to award custody of that child to another person is no clearer when the proceedings fall under State law. No State statute contains an equivalent to s.10 of the Family Law Act, 1975-1976 (Cth.) dealing specifically with the question. To the best of our knowledge, the issue has never been litigated in South Australia. Test cases have arisen in other States, but no uniform principle has emerged, the matter being treated simply as one of the interpretation of the particular statute in force in each State.

As a result of the definition of “matrimonial cause” and “child of a marriage” in the Family Law Act, 1975-1976 (Cth.),⁸⁵ the following types of custody disputes fall outside the scope of federal law and are governed by State law: disputes over a child of husband and wife where a person other than husband or wife (*e.g.*, a grandmother or foster-parent) applies for custody; disputes between husband and wife over a child of one of them; disputes between the unmarried parents of their child born outside marriage; disputes between the parents of a child born outside marriage and a third party (*e.g.*, a foster-parent). If an order under s.39 of the Community Welfare Act has been made in respect of such a child, can the Supreme Court of South Australia hear any subsequent application for custody of such child, either under the Guardianship of Infants Act, 1940-1975 (S.A.) or in its inherent wardship jurisdiction?⁸⁶ Or is its jurisdiction excluded so long as the order under s.39 remains in force?

One can envisage some practical applications of this general problem:

(a) Suppose the unmarried parents of a child agree to their child being taken into the care and control of the Minister under s.39, and the child is

83. *Id.*, 76, 318.

84. *Id.*, 76, 312.

85. *Id.*, s.4(1), (5).

86. Derived from the legislation by which the court was originally established and by which the jurisdiction of the courts of equity was conferred upon it: see Finlay and Bissett-Johnson, *Family Law in Australia* (1972), 198 n.103.

placed by the Department for Community Welfare with foster-parents. The parents later find themselves able to provide a satisfactory home, and apply to the Minister to have the care and control order discharged. This application is refused, and the parents' appeal against refusal is rejected by the Juvenile Court. Has the Supreme Court jurisdiction to hear an application by the parents for an order vesting the custody of the child in them?

(b) Suppose the unmarried parents of a child born outside marriage consent to the child being taken into care and control under s.39, and the Department for Community Welfare places the child with foster-parents. If the Department later removes the child from the foster-parents in circumstances which the foster-parents consider improper and places it elsewhere, can the foster-parents apply to the Supreme Court for custody?

(c) Suppose the married parents of a "child of a marriage" consent to their child being taken into care and control under s.39, and the Department places the child with some relatives (*e.g.*, its grandparents). Later the child is removed by the Department for reasons which the grandparents consider improper, and is placed elsewhere. Can the grandparents apply to the Supreme Court for custody?

The problem of the jurisdiction of the Supreme Court arises also in the case where an order placing a child under the care and control of the Minister has been made, not under s.39 of the Community Welfare Act, but pursuant to the procedure provided in the Juvenile Courts Act, 1971-1974 (S.A.), Parts V or VI (*e.g.*, where the child is a neglected or uncontrolled child). Presumably the same legal consequences in the field of custody flow from placing a child under the Minister's care and control under the Juvenile Courts Act as from placing him under care and control through s.39 of the Community Welfare Act. In both cases the exclusive custody and guardianship of the child is vested in the Minister. However, this result produced by the Juvenile Courts Act procedure may appear less open to objection than the s.39 procedure, since it involves some judicial intervention (by the Juvenile Court) rather than a purely administrative process. However, in this area too, the question of whether the Supreme Court of South Australia retains jurisdiction to entertain a subsequent custody application remains unsolved. There are some interesting decisions of the High Court on similar problems raised by comparable legislation in other States. In two decisions, the High Court has held that a Supreme Court has jurisdiction to make a custody order in respect of a child who is subject to care and control order. In another case, it was held that the Supreme Court's jurisdiction was ousted.

*Carseldine v. Director of Children's Services*⁸⁷ concerned the effect of the Queensland equivalent of s.39, s.47 of the Children's Services Act, 1965-1973 (Qld.). A mother of four children applied to have the children admitted to the care and protection of the Director under s.47; the Director made a declaration in April 1970. In July 1972, the Director placed the children with their maternal grandparents, as being suitable foster parents. In August 1973, the Director ordered that the children should be allowed to spend a holiday with their mother. On 15th September, the grandparents removed the children from the mother's home, because they were concerned with the danger to the children's health and morals. On 24th September, the Director had the children returned to their mother's home. The grandparents began

87. (1974) 48 A.L.J.R. 344.

proceedings in the Supreme Court of Queensland, seeking custody of the children. They alleged that the mother's home was unfit for the children, that the mother and the man with whom she was living drank, and that the children were kept in squalid conditions and had been assaulted. The Full Court of the Supreme Court of Queensland held that its jurisdiction to make an order for the custody of a child who was the subject of a declaration made by the Director under s.47 had been abrogated by the provisions of the Children's Services Act.

On appeal, the High Court reversed the decision of the Full Court, on the basis that the words of the statute did not sufficiently clearly deprive the Supreme Court of jurisdiction. S.55 of the Children's Services Act provides:

"(1) When the Director has declared a child to be admitted to his care and protection, or a Children's Court has ordered that a child be admitted to the care and protection of the Director, the guardianship of such child in care shall pass . . . and vest in the Director."

The High Court's approach was a legalistic one, but their Honours obviously had in mind policy considerations of the desirability or otherwise of custody being determined conclusively by administrative action. Speaking of the s.47 procedure, Mason J. said:⁸⁸

"Indeed, it is the exercise of an administrative discretion by the Director himself which initiates the regime of care and protection. Although the Director is required to make inquiry and investigation and to hear objections, his decision is not a judicial determination . . . In considering whether there is a necessary implication that the inherent jurisdiction is displaced, it must be kept firmly in mind that in accordance with tradition the guardianship and custody of infants has been the subject of judicial determination . . . A total departure from the procedure of judicial determination, the substitution for it of a system of administrative discretion is, I think, a conclusion not lightly to be attributed to a statute unless its language and provisions clearly compel that result . . . The vesture of wide and general powers in the Director is not inconsistent with the continued existence of the Supreme Court's inherent jurisdiction . . . Clearly enough, the Court will not lightly interfere once the Director has made a declaration under Section 47. But if it should appear that he is not acting in conformity with the Act . . . in breach or disregard of his statutory duties, the court will exercise its paternal jurisdiction, if need be, by making an order for custody . . ."

In a very recent decision, the High Court considered the situation where a child had been admitted to the care and control of a State Welfare Department pursuant to the order of a children's court, rather than by administrative procedure. Again, it was held that the Supreme Court's custody jurisdiction was not ousted.

*Johnson v. Director General of Social Welfare for Victoria*⁸⁹ concerned the effect of the Social Welfare Act, 1970 (Vic.). The Children's Court at Melbourne in October 1971 ordered that a child then aged two months

88. *Id.*, 351.

89. (1976) 50 A.L.J.R. 562.

be admitted to the care of the Department of Social Welfare, the Court finding that she was an "exposed child" within the meaning of s.31(f) of the 1970 Act. The parents tried to obtain the return of the child; an appeal by them to the County Court under s.48 of the Children's Court Act, 1958 (Vic.) was unsuccessful. They then instituted proceedings in the Supreme Court of Victoria, seeking to have the child made a ward of the court and to obtain custody of the child. Anderson J. considered that he had jurisdiction, and ordered that the child be placed in the parents' custody. The Full Court held that the Supreme Court had no jurisdiction to place a child who had been admitted to the care of the Department in the custody of any person, and it set aside the custody order. The parents appealed to the High Court.

S.36 of the Social Welfare Act, 1970 (Vic.) provides:

- (1) The Director-General shall to the exclusion of the father, mother and every other guardian become and be the guardian of the person and estate of any child or young person admitted to the care of the Department . . .
- (2) Subject to this Act, the Director-General shall have as guardian the same rights, powers, duties, obligations and liabilities as a natural guardian of the child or young person would have."

S.37 provides:

"Without affecting the generality of the provisions of Section 36, the Director-General shall have the sole right to the custody of any child or young person admitted to the care of the Department."

The High Court held that these statutory provisions did not oust the jurisdiction of the Supreme Court of Victoria to make an order for the custody of a child. Barwick C.J. said:⁹⁰

". . . if the Parliament wishes to take away from this court its power of supervising the guardianship, and protecting the welfare, of children, it must do so in unambiguous language . . . In my opinion, nothing in the language of the Act suggests any intention on the part of the Victorian legislature to remove from the Victorian Courts their traditional and well-authenticated jurisdiction in connection with the welfare of infants and the supervision of guardians."

The High Court concluded that the words in s.37(a) do no more than describe the rights of the Director-General as sole statutory guardian under s.36, subject always to the power of the court to place the child in the custody of some other person. Once again, the members of the court obviously felt it desirable that the Supreme Court's jurisdiction not be ousted. Barwick C.J. said:⁹¹

"It is to my mind supremely important that there should remain in the courts the ability in appropriate cases to supervise the actions and the performance of the duties of the public servants to whom such children are committed."

Murphy J. said:⁹²

"There are good reasons for leaning against an interpretation which would exclude the traditional protective power. Apart from the exercise

90. *Id.*, 564.

91. *Ibid.*

92. *Id.*, 565.

of this protective jurisdiction, the restraints placed upon the Director-General's use of his powers are minimal. Authorities on family law have commented on the tendency of State Welfare Agencies to retain permanent custody of children, against the wishes of the natural parents although the reasons for removal from the parents may have been only temporary."

*Minister of State for the Interior v. Nyens*⁹³ provides a contrast to the two abovementioned decisions, for there the High Court held that the Supreme Court of the Australian Capital Territory had been deprived of its jurisdiction, both under the Infants Custody and Settlements Ordinance, 1956 (A.C.T.) and under the Australian Capital Territory Supreme Court Act, 1933-1959 (Cth.), to hear and determine an application for the custody of a child who was a ward under the Child Welfare Ordinance, 1957 (A.C.T.). S.19(1) provides that:

"Notwithstanding any other law of the Territory relating to the guardianship or custody of children, or other young persons, the Minister is the guardian of a child or young person who is a ward, to the exclusion of the parent or other guardian."

A child was born as a result of a liason between a married man and an unmarried woman. Finding himself temporarily unable to look after the child, the father sought the help of the Child Welfare Department. The child was brought before a Magistrate and charged with being a neglected child under the Ordinance; the magistrate found the charge proved, and committed the child to the care of the Minister to be delt with as a ward. Soon afterwards, the father became reconciled with his wife, and they set up home together. He then attempted to get the child back from the Welfare Department. His attempts were unsuccessful, and so he started proceedings in the Supreme Court of the A.C.T. seeking custody of the child. The Supreme Court held that it had jurisdiction, and awarded custody of the child to its father. The Minister appealed to the High Court, which overruled the decision of the Supreme Court, on the basis of the "singularly emphatic language" of s.19.⁹⁴ The Court was aware of the serious implications of its decision. As Barwick C.J. said:

"In the present case, the use of the provisions of Part IX for what in my view was an inappropriate case has had the result that the question of what is best for this child, who is innocent of any wrongdoing and who can have a home with one of its progenitors, a home of a satisfactory kind, and whose parent has not really forfeited either by conduct or consent all rights to consideration of its custodian, is to be determined not by either of these progenitors, nor by a court, but by a public servant."⁹⁵

These decisions call for some comment. On an issue as fundamental as this, it is highly desirable that there should be uniformity of law throughout Australia. Yet no such uniformity exists. In the Australian Capital Territory, the Supreme Court's jurisdiction is excluded, whilst the Supreme Courts of Queensland and Victoria retain jurisdiction. It is not easy to predict how the High Court will interpret the wording of a particular statute. The wording

93. (1964) 113 C.L.R. 411.

94. *Id.*, 422.

95. *Id.*, 425.

of ss.36 and 37 of the Victorian Social Welfare Act appears emphatic, and yet it was held not to exclude the Supreme Court's jurisdiction. It is difficult to see how the language of the Victorian statute is less emphatic than that used in the Child Welfare Ordinance of the Australian Capital Territory, which was held to exclude the Supreme Court's jurisdiction. Indeed, the wording of the Victorian statute might appear even stronger than that of the Ordinance; the only possible explanation for interpreting the Ordinance as excluding the Supreme Court's jurisdiction whereas the Victorian statute does not is the inclusion in s.19(1) of the Ordinance of the words "Notwithstanding any other law of the Territory relating to the guardianship or custody of children or other young persons . . ." In other States, including South Australia, the question awaits determination. The wording of s.43 of the Community Welfare Act, 1972-1975 (S.A.) might appear no more emphatic to the High Court than that of ss.36 and 37 of the Victorian Social Welfare Act. Equally undesirable as the disparity between State laws is the disparity between state and federal law.⁹⁶

We submit that it is desirable for the Supreme Court of a State to have jurisdiction to determine the custody of a child who is the subject of a care and control order under child welfare legislation. This jurisdiction provides the ultimate safeguard of the interest of the child. But it is equally important that it should be very sparingly exercised, in cases where there are special reasons why the care and control order should be overridden.

A final comment may be made on the legal position in the Australian Capital Territory and in other States where it may be held that the jurisdiction of the Supreme Court is excluded in respect of a child who is the subject of a care and control order. Jurisdiction is excluded only in respect of a child who has validly been admitted to government control. If it can be shown that the purported admission was not authorized by the enabling statute, the Supreme Court has jurisdiction to make an order for the custody of the child. The validity of the purported admission to government control can be tested by instituting proceedings for one of the administrative law remedies such as the writ of *habeas corpus* or a declaration.⁹⁷ There is a very recent example from the Australian Capital Territory of parents applying for a writ of *habeas corpus* in an attempt to secure the release of their child; the Supreme Court of the Australian Capital Territory⁹⁸ (upheld by the High Court on this point⁹⁹) found that the child's admission to government control was invalid. This case will be discussed in a later section.

(iii) *The English Situation*

It may be useful to examine the English approach to the problem. The relevant statute is the Children Act, 1948 (U.K.), as amended by the Children Act, 1975 (U.K.). S.1 of the Act places local authorities under a duty to receive into care children under seventeen whose parents are (*inter alia*) temporarily or permanently prevented by incapacity or other circumstances from providing the child's proper accommodation, maintenance and upbringing, and the intervention of the local authority "is necessary in the interests of the welfare of the child". Children once received into care may

96. Family Law Act, 1975-1976 (Cth.), s.10 (3). But see *Re Demack; ex parte Plummer* (1977) F.L.C. (CCH) 90-244, discussed *supra*, pp.58-60.

97. See the discussion *infra*.

98. *R. v. Director of Child Welfare; Ex parte Ford* (1976) 9 A.L.J.R. 13.

99. *Director of Child Welfare v. Ford* (1977) 12 A.L.R. 577.

be retained until they reach eighteen. But merely taking a child into care under s.1 does not *per se* transfer rights of custody or guardianship from the parents to the local authority.¹⁰⁰ If the local authority wishes to assume such rights over the child without going through a court process,¹⁰¹ it must proceed under s.2 of the Act. That section provides a purely administrative procedure whereby the local authority can assume rights of custody and guardianship over a child taken into care under s.1. The local authority must pass a resolution. It may do so if it "appears" (*inter alia*) . . .

"(b) that a parent of his—

- (i) has abandoned him, or
- (ii) suffers from some permanent disability rendering him incapable of caring for the child, or
- (iii) . . . suffers from a mental disorder . . . which renders him unfit to have the care of the child, or
- (iv) is of such habits or mode of life as to be unfit to have the care of the child, or
- (v) has so consistently failed without reasonable cause to discharge the obligations of a parent as to be unfit to have the care of the child."¹⁰²

The parent or other person having parental rights may consent in writing to the passing of the resolution. If not, the local authority must give notice to the parent, informing him of his right to object.¹⁰³ If the parent makes no objection the resolution stands. If the parent objects, the resolution lapses, unless the local authority within fourteen days makes a "complaint" to the juvenile court.¹⁰⁴ That court will then determine the complaint, either by making no order (in which case rights of custody and guardianship remain with the parent) or by ordering that the resolution shall not lapse. In the latter case, rights of custody and guardianship over the child vest in the local authority until the child reaches eighteen years of age. The juvenile court may order that the resolution shall not lapse, despite the objection of the parent, only if it is satisfied that it is in the interests of the child that the resolution should remain in force.¹⁰⁵ Parents have a right of appeal to the High Court.¹⁰⁶

Some changes in this procedure were introduced by the Children Act, 1975 (U.K.). The mere fact that a child has been in care for three years now entitles the local authority to pass a resolution.¹⁰⁷ Moreover, a resolution in respect of a child can now be passed if a parent has given grounds for the passing of a resolution in respect of some other child.¹⁰⁸

How does the English procedure compare with that under the Community Welfare Act, 1972-1975 (S.A.)? More importance is attached to parental

100. But see Children Act, 1975 (U.K.), ss.56(1), 33(3)(c), 57, which appear to undermine the parental right to custody of a child in care under Children Act, 1948 (U.K.), s.1.

101. Under the Children and Young Persons Act, 1969 (U.K.), s. 1.

102. Children Act, 1948 (U.K.), s.2(1) as substituted by Children Act, 1975 (U.K.), s.57.

103. *Id.*, s.2(2).

104. *Id.*, s.2(5) as substituted by Children Act, 1975 (U.K.), s.1.

105. *Id.*, proviso to s.2(5), as substituted by Children Act, 1975 (U.K.), s.57.

106. *Id.*, ss.4A, 4B, inserted by Children Act, 1975 (U.K.), s.57.

107. *Id.*, s.2(1)(d), as substituted by Children Act, 1975 (U.K.), s.57.

108. *Id.*, s.2(1)(c), as substituted by Children Act, 1975 (U.K.), s.57.

consent to the making of an order in South Australia than in England. In South Australia, an order under s.39 of the Community Welfare Act, 1972-1975 (S.A.) simply cannot be made in the first place without parental consent.¹⁰⁹ A resolution under s.2 of the Children Act, 1948 (U.K.) can be passed and confirmed in England without parental consent, if the juvenile court considers that the interests of the child demand that parental objections be overridden. The English procedure may therefore appear to be a more drastic administrative interference with parental rights than its South Australian equivalent. However, some judicial scrutiny of the exercise of the local authority's power is provided in England by the referral of the issue to the juvenile court,¹¹⁰ which must decide what is in the best interests of the child. There is a further right of appeal to the High Court.¹¹¹ Hence the exercise of the local authority's power in England is safeguarded by adequate opportunities for judicial evaluation of the situation. A further independent safeguard exists in England. It is still possible for a parent to invoke the prerogative power of the wardship jurisdiction of the High Court (formerly exercised by the Chancery Division, now by the Family Division) as a means of challenging the local authority's resolution. The jurisdiction of the High Court to act as *parens patriae* to young children is not in principle abrogated by the passing of a resolution under s.2 of the Children Act, 1948 (U.K.).¹¹² The court will determine the issue of custody and guardianship according to the principle that the welfare of the child is the paramount consideration. However, the High Court has adopted the attitude that its jurisdiction should not readily be exercised, and especially not to substitute the judge's own view as to the best interests of the child for those of the local authority.¹¹³ The High Court will intervene only if there are good grounds¹¹⁴ for showing that the local authority has acted outside its statutory powers,¹¹⁵ or has not exercised them in good faith or has improperly exercised its discretion.¹¹⁶ The position adopted by the High Court in England is correct. It strikes a balance between the need for an ultimate independent legal safeguard and the danger of over-interference by a judicial body with the operation of child welfare services. The High Court will intervene only in exceptional cases where there has been a real misuse of administrative power.¹¹⁷

109. Unless the whereabouts of the parent cannot after reasonable inquiry be ascertained: Community Welfare Act, 1972-1975 (S.A.), s.39(4).

110. Children Act, 1948 (U.K.), s.2(5) as substituted by Children Act, 1975 (U.K.), s.57.

111. *Id.*, ss.4A, 4B, inserted by Children Act, 1975 (U.K.), s.57.

112. *Re M.* [1961] Ch. 328.

113. *Re T.* (A.J.J.) [1970] Ch. 688, 690 *per* Russell L.J. This case is cited by Cretney, *Principles of Family Law* (2nd ed., 1976), 380, n.13 as a "notorious example" of invoking the wardship jurisdiction. A local authority decided to return the child in its care under a fit person order to its mother for a trial period. The foster-parents made the child a ward: the trial judge heard full evidence on facts and merits, and agreed with the local authority that the trial return was justified in the interests of the child's welfare. The hearing before Ungood-Thomas J. involved solicitors, three counsel, and a judge for eleven days; in the Court of Appeal, the four-day hearing involved three Lord Justices and no fewer than six counsel. The cost to the public could not have been less than £5,000 (the parties were legally aided), a sum which would have paid the annual salaries of several child care officers. "Yet it is difficult to see how any of this expenditure contributed to the welfare of this (or any other) child" (*ibid.*).

114. *Re M.* [1961] Ch. 328.

115. *Re T.* (A.J.J.) [1970] Ch. 688.

116. *Re B.* (A Minor) (*Wardship: Child in Care*) [1975] Fam. 36, 41-3.

117. This may be substantially similar to the role which the Family Court of Australia was intended to play under s.10(3) of the Family Law Act, 1975-1976 (Cth.). But see *Re Demack; ex parte Plummer* (1977) F.L.C. (CCH) 90-244, discussed *supra*, pp.58-60.

(C) THE "ADMINISTRATIVE LAW" REMEDIES

The Minister for Community Welfare is a public authority. The making of an order under s.39 of the Community Welfare Act, 1972-1975 (S.A.), or subsequent Departmental handling of the child, may be challenged by an interested party having recourse to one of the remedies which provide general safeguards against improper exercise of administrative power. These remedies are granted by the ordinary courts. In such proceedings, the court is asked to pronounce upon the legality of a particular administrative act or decision. The underlying principle is that a public body can act lawfully only within the limits of the powers conferred on it by statute; action outside these limits is *ultra vires*. Hence the court reviews the legality, rather than the merits, of administrative action. The use of such remedies as a means of challenging Ministerial assumption of rights of custody and guardianship over a child is more than a theoretical possibility, for there is a very recent example of such a remedy being invoked in Australia.¹¹⁸

Which remedy is most appropriate as a means of challenging Ministerial assumption of custody and guardianship rights? The remedies can be classified into two groups—the "prerogative" remedies, and the ordinary remedies of private law specially adopted for the public law context. Of the prerogative remedies certiorari¹¹⁹ quashes a determination which is *ultra vires* or made under an error of law; it is a means of directly impugning the legality of administrative action. Unfortunately, there are problems associated with its scope, which may limit its utility in the present context.¹²⁰ However, another of the prerogative remedies may be particularly suitable as a means of challenging Ministerial assumption of guardianship and custody rights under s.39. This is the writ of *habeas corpus*,¹²¹ which is the traditional procedure for securing the release of a person from illegal detention. The court orders the production of a person and inquires into the cause of his detention. If legal justification for detention cannot be shown, the court will order the person to be released.¹²² This writ may be used to challenge the legality of any detention, including that caused by a public official. It will issue against the Crown.¹²³ It may therefore be a useful way of determining whether a child is lawfully being held in the custody of the Minister of Community Welfare pursuant to the making of an order under s.39 of the Act. *Habeas corpus* proceedings are a method of challenging the legality of administrative action collaterally; where the detention is sought to be justified by the decision or order of a public body, the court is required to pronounce on the validity of that decision or order. There is a striking instance of *habeas corpus* proceedings being used in Australia in an attempt to secure the release of a child held by a welfare authority under government control.¹²⁴

The declaration,¹²⁵ one of the "private law" remedies, is widely used as a means of direct challenge to the legality of administrative action. In an action

118. *R. v. Director of Child Welfare; Ex parte Ford* (1976) 9 A.C.T.R. 13 (S.C.); (1977) 12 A.L.R. 577 (H.C.).

119. See de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), 337-383.

120. It will not issue against the Crown itself nor against a statutory body which is the direct agent of the Crown; *sed quaere* whether the Minister of Community Welfare is identified with the Crown; see Community Welfare Act, 1972-1975 (S.A.), s.8. The availability of certiorari is limited by notions of functions: see *R. v. Electricity Commissioners* [1924] 1 K.B. 201, 204-205, *per* Atkin L.J.

121. See de Smith, *op. cit.*, Appendix 2; Brett and Hogg, *Cases and Materials on Administrative Law* (3rd ed., 1975), 74-90.

122. But see *Director of Child Welfare v. Ford* (1977) 12 A.L.R. 577, discussed *infra*.

123. *Darnel's Case* (1627) 3 St. Tr. 1 (K.B.).

124. *R. v. Director of Child Welfare; Ex parte Ford* (1976) 9 A.C.T.R. 13 (S.C.); (1977) 12 A.L.R. 577 (H.C.).

125. See de Smith, *op. cit.*, 424-469; Young, *Declaratory Orders* (1975).

for a declaration, the plaintiff asks the court to declare the legal position—in this context, the legality or otherwise of an administrative act or decision. The declaration is not restricted by an notion of “acting judicially”, and will issue against the Crown.¹²⁶ Given the problems associated with certiorari, proceedings for a declaration may be the most appropriate method of directly challenging such an order.

On what grounds might be legality of an order made under s.39 of the Community Welfare Act be directly challenged through proceedings for a declaration? The basis for challenge must be that the making of the order was *ultra vires*. What then is the scope of the *vires* doctrine? Clearly, if the correct procedural formalities specified in s.39 have not been observed before placing the child under the care and control of the Minister, there is a case of procedural *ultra vires* which renders the order invalid. But on what substantive grounds could an order be challenged? S.39 vests a wide discretion in the Minister. An interested person’s challenge to the making of an order might be little more than an assertion that the decision taken by the Minister is wrong—and such a challenge is not within the scope of judicial review. However, there are several grounds on which it is possible to claim that the Minister’s decision to make an order under s.39 was *ultra vires*. The courts have rejected the notion of “unfettered” administrative discretion,¹²⁷ and assume that the legislature intended even a discretionary power to be exercised within certain limits. A discretionary power exercised outside those limits is *ultra vires*. What are those limits? There are two, which are not always readily distinguishable. The first is that a discretionary power must be exercised in accordance with the policy and intention behind the empowering statute.¹²⁸ The objectives of the Department for Community Welfare and the Minister are expressly stated in s.7 of the Act. Secondly, the courts maintain that a discretionary power must be exercised reasonably. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*,¹²⁹ Lord Greene M.R. said:

“When discretion of this kind is granted, the law recognises certain principles upon which that discretion must be exercised . . . What then are those principles? . . . The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters . . . A person entrusted with a discretion must . . . direct himself properly in law. He must call his own attention to the matters which he is bound to consider . . . Similarly, there may be something so absurd that no reasonable person could ever dream that it lay within the powers of the authority . . .”

It might be alleged that the Minister, in making an order under s.39, had taken account of irrelevant factors, or discounted relevant ones.

126. *Dyson v. A.-G.* [1911] 1 K.B. 410.

127. *Padfield v. Minister of Agriculture* [1968] A.C. 997.

128. *Ibid.*; *Brownells Ltd. v. Ironmongers' Wages Board* (1950) 81 C.L.R. 108, esp. 120, 130; *Bailey v. Conole* (1931) 34 W.A.L.R. 18.

129. [1948] 1 K.B. 223, 228-9.

An interested person's challenge to the making of a s.39 order could allege that there was a lack of evidence that the child might "otherwise become neglected or uncontrolled".¹³⁰ In other other words, it might be alleged that the facts did not justify the making of the order by the Minister. Can such a claim be fitted in to the *ultra vires* concept, or does it go to the merits of the Minister's decision? It may be possible to challenge the Minister's decision on evidentiary grounds. A distinction must be drawn between no evidence and insubstantial evidence. An inference wholly unsupported by evidence is regarded by the courts as an error of law¹³¹ and possibly as a jurisdictional error.¹³² But what of the case where an interested person feels that the Minister came to a wrong conclusion on the evidence placed before him? This type of claim comes very close to an allegation that the Minister's decision in respect of a particular child was wrong on the merits—in effect, it comes close to being an appeal. Australian law may not yet have extended the concept of judicial review far enough to cover this type of challenge. The cases referred to¹³³ concerned challenges to administrative decisions allegedly supported by no evidence, and not decisions based on allegedly insubstantial evidence. Insubstantial evidence is evidence which no reasonable mind would consider adequate to support the conclusion reached. If the Minister made a care and control order under s.39 of the Community Welfare Act and an interested party felt that the evidence fell short of establishing that the child might otherwise become neglected or uncontrolled, could that interested party challenge the Minister's decision? The law here is in a state of uncertainty, but no Australian decision has yet admitted a right of challenge in such a case. However, in *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* it was said that:

“. . . the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come . . .”¹³⁴

In the United States of America, courts have a wide power to review decisions of administrative bodies which are not based on substantial evidence.¹³⁵ No Australian court has yet assumed this power, and it is at least arguable that it should not do so. The development of the law in this area must be based on policy considerations: how desirable is it for a court to substitute its own view of the evidence for that of the Minister? It can be argued that the Minister for Community Welfare is in a far better position to evaluate the evidence in an application under s.39 than a court which is remote from the workings of the Act. Too wide a power of judicial review would bring with it the danger of endless challenge to decisions, and the operation of the system of child welfare law would suffer.

Habeas corpus proceedings provide a means whereby the legality of an administrative act or decisions can be challenged collaterally. The scope of

130. Community Welfare Act, 1972-1975 (S.A.), s.39(2).

131. *Allison v. General Council of Medical Education and Registration* [1894] 1 Q.B. 750; *R. v. Birmingham Compensation Appeal Tribunal, ex p. Road Haulage Executive* [1952] 2 All E.R. 100; *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* [1965] 1 W.L.R. 1320; *Coleen Properties Ltd. v. Minister of Housing and Local Government* [1971] 1 W.L.R. 433.

132. *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* [1965] 1 W.L.R. 1320; *Coleen Properties Ltd. v. Minister of Housing and Local Government* [1971] 1 W.L.R. 433.

133. *Supra*, nn.124, 125.

134. [1965] 1 W.L.R. 1320, 1326 *per* Lord Denning M.R.

135. *E.g., Consolidated Edison Co. v. National Labour Relations Board* 305 U.S. 229 (1938).

judicial review by *habeas corpus* may be wider than in proceedings for a declaration. It appears to include the grounds already mentioned in relation to the declaration, but there are indications that in *habeas corpus* proceedings a court may inquire whether a decision by which a detention is alleged to be justified was supported by substantial evidence. In *R. v. Governor of Brixton Prison; ex parte Armah*,¹³⁶ a majority of the House of Lords felt able to inquire whether the decision of a magistrate to extradite an alleged fugitive offender was based on sufficient evidence. The appellant contended that the evidence before the magistrate was insufficient to raise a strong or probable presumption that he committed the offence, and that no reasonable magistrate could have decided that it did raise such a presumption. The House of Lords considered the function of a court reviewing the magistrate's decision. Lord Pearce said that the court reviewing the decision:

“. . . has a duty to see that the magistrate had before him such evidence as gave him authority to commit.”¹³⁷

Lord Upjohn saw the duty of the reviewing court:

“. . . to see whether the evidence before the magistrate . . . is sufficient to justify his acting reasonably to commit the accused.”¹³⁸

However, Lord Morris took a different view. In his opinion, it was clear that:

“. . . there was evidence before the magistrate upon which he could act . . . and it is not open to the higher court to examine the sufficiency of the evidence with a view to substituting its own judgment and assessment for that of the magistrate”.¹³⁹

If the principles stated by the majority of their Lordships are not confined to extradition proceedings or to review of decisions of magistrates as opposed to those of administrative authorities in general, it appears that in *habeas corpus* proceedings a court could inquire whether the decision of the Minister to place a child in his care and control under s.39 was based on sufficient evidence.

In *R. v. Director of Child Welfare; Ex parte Ford*,¹⁴⁰ *habeas corpus* proceedings were used by parents in an attempt to secure the release of their child who was being held by the Director of Child Welfare in the Australian Capital Territory. S.19(1) of the Child Welfare Ordinance, 1957-1974 (A.C.T.) provides that, notwithstanding any other law of the Territory, the Minister is the guardian of a child who is a ward, to the exclusion of the parent or other guardian. S.18 provides for the admission of a child to government control:

“(1) The Minister shall—

- (a) admit a child or young person to government control for the purpose of being apprenticed, boarded out, placed out or placed as an adopted boarder where—
 - (i) a court has committed the child or young person to the care of the Minister . . . to be dealt with as a ward admitted to government control; or

136. [1968] A.C. 192.

137. *Id.*, 255.

138. *Id.*, 257.

139. *Id.*, 241.

140. (1976) 9 A.C.T.R. 13.

- (ii) the Minister is satisfied that it is necessary in the interests of the child or young person so to do and, if the child or young person is in the custody of a parent, the parent has requested or consented to the admission of the child or young person to government control”.

Mr. and Mrs. Ford were the parents of seven children, including Steven who was born in 1967. In July 1970, Mr. Ford was having difficulty in coping with Steven and requested assistance from the Welfare Branch of the Department of the A.C.T. After a discussion with two social workers, one of whom was attached to the Welfare Branch of the Department, Mr. and Mrs. Ford signed a form requesting that the Minister admit Steven “to State control”. They had not read the document and they failed to appreciate, at the time of signing it, that the effect of admission to government control was that the Minister would be Steven’s guardian to the exclusion of themselves.

On the same date as Mr. and Mrs. Ford signed the document, the delegate of the Minister signed a document which purported to approve Steven’s admission to government control under s.18(1) (a) (ii) of the Ordinance. The document did not set out that the Minister was satisfied that it was necessary in the interests of Steven to admit him to government control, nor that Steven’s admission was for any of the particular purposes specified in s.18(1)(a) of the Ordinance. The Minister’s delegate was in fact satisfied that the admission was necessary in Steven’s interest, but there was no evidence that it was necessary for any particular purpose. The document referred to Steven as “being considered to be under incompetent guardianship and ill-treatment by a parent”.

Steven was placed in Marymead, a Catholic children’s home where he remained for several years. He made several visits home, but on each occasion was returned by his parents who found themselves unable to cope with him. In June 1975, an officer of the Welfare Branch informed Mrs. Ford that Steven was not available to her. Mr. and Mrs. Ford then desired that Steven be returned to them to be brought up in the family home with their other six children. The Welfare Branch refused their request, and Mr. and Mrs. Ford instituted *habeas corpus* proceedings in the Supreme Court of the Australian Capital Territory, seeking an order calling on the Director of Child Welfare to show cause why the child should not be brought before the court—in effect, to obtain Steven’s release from government control.

In *Minister for the Interior v. Nyens*,¹⁴¹ the High Court had held that the provisions of the Child Welfare Ordinance 1957-1974 (A.C.T.) deprive the Supreme Court of jurisdiction (both under the Infants Custody and Settlements Ordinance, 1956 and under the Supreme Court Act) to make an order touching the custody of a child who is a ward within the meaning of the Child Welfare Ordinance. Had Steven been validly admitted to government control and become a ward within the meaning of the Ordinance? Connor J. held that Steven’s purported admission to government control was invalid, on two grounds. In the first place, the document which Mr. and Mrs. Ford had signed requesting Steven’s admission to government control was defective in form. The document requested that Steven be admitted “to State control”, whereas the Ordinance used the expression “government control”. Connor J.

141. (1964) 113 C.L.R. 411.

felt justified in interpreting the document strictly, in view of its far-reaching effects on guardianship rights. Secondly, the admission of a child to government control can be authorised, according to Connor J., only if it is for one of the four specified purposes listed in s.18(1), namely, for being apprenticed, boarded out, placed out or placed as an adopted boarder. There was no evidence that the Minister or his delegate was satisfied that it was necessary in Steven's interest to admit him to government control for any of the authorised purposes. Finding that Steven's purported admission to government control was invalid, His Honour ordered that the Director of Child Welfare discharge Steven to the custody of his parents. In making the order, he relied on the parents' common law right to the custody of their child.

Execution of this order was stayed while the Director of Child Welfare appealed to the High Court. The High Court allowed the appeal.¹⁴² It upheld Connor J.'s finding that Steven had been invalidly admitted to government control, on the ground that he had not been admitted "for the purpose of being apprenticed, boarded out, placed out or placed as an adopted boarder" within the meaning of s.18(1) of the Child Welfare Ordinance. The High Court held that the words "boarded out, placed out or placed as an adopted boarder" require that a child be placed with a natural person and not in an institution.

"There is a great difference between placing a child in an institution and placing him in the care of a private individual. The latter and not the former purpose is recognised by s.18(1)(a)".¹⁴³

Steven had been admitted for the purpose of placing him at Marymead, a Catholic children's home. Having held that Steven's purported admission to government control was invalid on this ground, the High Court considered it unnecessary to determine whether the request which his parents had made was correct in form. The High Court thus agreed with Connor J. that Steven was not a ward within the meaning of the Child Welfare Ordinance, but there the agreement ended. The High Court held that the consequent order made by Connor J. requiring Steven to be discharged to the custody of his parents was incorrect. Connor J. had held that once the invalidity of Steven's admission to government control was established, his parents (who had custody before the admission was made) were entitled to custody, by virtue of their common law rights. The High Court disagreed. It held that s.17 of the Infants Custody and Settlement Ordinance, 1956 (A.C.T.) applies to all proceedings where custody is in issue, and not merely to proceedings brought under that Ordinance itself. S.17 therefore applied to the present *habeas corpus* proceedings. That section provides, *inter alia*,

"Where, in a proceeding before a court, the custody or upbringing of an infant . . . is in question, the court in deciding that question shall regard the welfare of the infant as the first and paramount consideration".

The High Court held that there was no evidence before Connor J. sufficient to enable him to decide whether it was in Steven's best interest that he should remain in the custody of the Director of Child Welfare or be restored to his parents.

142. (1977) 12 A.L.R. 577.

143. *Id.*, 586 *per* Gibbs & Mason J.J.

It will be seen that the court adopted an extremely narrow construction of s.18(1) of the Child Welfare Ordinance in holding that the words "boarded out, placed out or placed as an adopted boarder" required a child to be placed with a natural person. With respect, it is submitted that this construction is neither justified in law nor desirable in principle. The High Court referred to s.57(1)(d) of the Ordinance as a special provision for a child being committed to an institution. This refers to a child committed to an institution by a court following proof of the commission of an offence. S.55, to which the High Court might also have referred, provides for a child to be admitted to an institution when found by a court to be neglected or uncontrollable. If the High Court's construction of s.18(1) is correct, children cannot be placed in an institution except following court proceedings. It is submitted that this is highly undesirable. There are situations where parents request the admission of a child to government control (and therefore s.18 and not court proceedings is appropriate) where it may be in the child's best interests to be placed in an institution. To limit the scope of s.18 to the placement of a child with foster-parents imposes an unwarranted restriction on the avenues open to the Department when approached by parents unable to cope with a child. The High Court was aware of the implication of its decision:

"The consequences of this decision may possibly be serious. It may be that other children in the Australian Capital Territory have been wrongly admitted to government control. If so, the situation would appear to call for the most urgent remedial legislation which, one would hope, would not repeat the defects and anachronisms of the present Ordinance."¹⁴⁴

Criticism may also be levelled against the High Court's conception of the role of a court in *habeas corpus* proceedings. It held that, once the admission of a child to government control is found to be invalid, the principle enunciated in s.17 of the Infants Custody and Settlements Ordinance, 1956 applies in the *habeas corpus* proceedings; the welfare of the child is the first and paramount consideration. The High Court thus applied to proceedings for a prerogative writ a principle contained in a statute dealing with a different type of proceedings altogether—proceedings for custody brought under the statute. In this, it is submitted, it was wrong. According to the High Court's decision, the court hearing the application for *habeas corpus* cannot simply order the release of a child invalidly held under government control to its parents (who had custody before the purported admission was made). It must take a further step, and decide to whom custody should be awarded in the best interests of the child—to the parents, or to the Director for Child Welfare. Thus two duties are imposed on the court hearing this type of application for *habeas corpus*: it must first determine the legality or otherwise of the admission to government control, and then, if illegality is established, proceed to determine the custody issue on its merits. With respect, the second step is inconsistent with the concept of judicial review. *Habeas corpus* is a prerogative writ, and the function of the court hearing an application for *habeas corpus* (or for any other prerogative writ or indeed any of the administrative law remedies) is to review the legality of the action of an inferior judicial or administrative body. Consideration of the

144. *Ibid.*

merits of a case is beyond the scope of judicial review. It is submitted that Connor J. was correct in holding that once Steven's admission to government control was found invalid he should be released to the custody of his parents (who had custody before the purported admission).

4. Conclusion

We have attempted to outline some of the problems associated with the present operation of s.39 of the Community Welfare Act, 1972-1975 (S.A.), and some of the safeguards to which recourse may be had in cases of misapplication of the statutory power. A number of defects in the present procedure emerge. Social workers are unclear as to when s.39 should be used in preference to Juvenile Court proceedings as a means of securing a care and control order over a child. The Department for Community Welfare's Standard Procedures appear to imply a preference for court proceedings, the disadvantages of which we have referred to. As the law stands at present a report from an Assessment Panel is not a mandatory pre-requisite to the making of an order under s.39. Such an order has drastic effects on rights of custody and guardianship, yet, as we have noted, the parents or child consenting to the making of the order may fail to appreciate its effects, whether by reason of low intelligence or because the position has not been adequately explained to them. The effect of an order made under s.39 is to deprive parents of their legal rights of custody and guardianship over their child;¹⁴⁵ this may be destructive of the parent/child relationship. S.42 of the Act places the Minister and Director-General of Community Welfare under a duty to "conserve . . . as far as possible a satisfactory relationship between the child and . . . his family". The Department for Community Welfare should be able to do more for children in need of care without the necessity of removing guardianship rights from the parents in all cases.

The particular problem of s.39 of the Community Welfare Act is illustrative of the far wider question of when and in what circumstances rights of custody and guardianship over children should be removed from parents and transferred to a State Welfare authority. This question was considered by the Murray Report,¹⁴⁶ in the limited context of non-accidental physical injury to children. The Report's main recommendation was that greater flexibility should be introduced in the type of orders which a court can make when the physical removal of a child from his parents is necessary for his welfare. The Report's recommendations were made in the specific context of its terms of reference, but they merit consideration in the wider context with which this article has been concerned. The Report recommended that legislation be implemented in South Australia to introduce a graduated system of removal of parental rights of custody and guardianship, culminating in a child being made available for adoption without parental consent. Another recommendation was that rights of custody and guardianship be transferred to either the Minister or some other person or body where the interests of the child so require. At first glance, these recommendations seem sensible, but on further consideration there would appear to be insuperable problems in implementing such a system of graduated removal of parental rights. In practice, how is the right to determine a child's long-term future to be shared? It is also difficult to envisage how such a division of rights between the parents and

145. Community Welfare Act, 1972-1975 (S.A.), s.43.

146. See n.19, *supra*.

a public authority or other body would operate in the daily running of a child's life.¹⁴⁷

We reject as impracticable the suggestion that custody and guardianship rights be shared between the Minister of Community Welfare and the parents of a child. In many cases, it may be unnecessary to remove custody and guardianship rights from parents, whilst offering substantial assistance from the State welfare authority. In England, s.1 of the Children Act, 1948 (U.K.) is widely used to take children into the care of local authorities without removing guardianship rights from the parents until the necessity arises, in which case a resolution is passed under s.2 of the Act. We suggest that this pattern be followed in South Australia, with guardianship rights being removed from parents only in extreme cases where the welfare of the child so demands. A report from a Departmental Assessment Panel should be made a mandatory pre-requisite to the making of all decisions affecting the long-term future of a child, including the transfer of guardianship rights to the Minister of Community Welfare. We have noted that, at present, s.40 of the Community Welfare Act, 1972-1975 (S.A.) is used to receive a child into the care and control of the Minister for a temporary period. We suggest that s.40 could be amended to achieve a similar effect to s.1 of the Children Act, 1948 (U.K.) permitting a child to be received into care for longer periods. The amended s.40 should state clearly that such reception into care does not transfer rights of custody and guardianship to the Minister. Moreover, under s.40 as it stands at present, a child under fifteen can be received into the care and control of the Minister only upon request by a parent or guardian.¹⁴⁸ The section thus fails to cover the situation where a child wishes to escape from an unhappy home environment (*e.g.*, where the parents are alcoholic), but the parents fail to make a request. By contrast, a local authority in England is not obliged to wait until the parents apply before receiving a child into care under s.1 of the Children Act, 1948 (U.K.). We recommend that the English pattern be followed in South Australia.

We accept that in certain cases it will be essential to remove custody and guardianship rights from the parents of a child and vest them in the Minister. S.39 of the Community Welfare Act should be retained for this purpose, with the report of an Assessment Panel made a pre-requisite to the making of an order. We suggest that one member of such a Panel be a lawyer specially appointed to advise on the legal implications of the making of the order, and to make those known to the parents and the child concerned. If these improvements in the process of taking children into the care of the State welfare authority were effected in South Australia, the need for independent legal safeguards to which interested persons can have recourse in case of dissatisfaction would be reduced, and there would be fewer instances in which a court unconnected with the background to the placement process would be called upon to review the situation and make a decision on the child's custody.

147. It is estimated that in one voluntary children's home in Adelaide (that of the Central Mission Child Care Services (Methodist Church)) there can be approximately twenty children at any one time under the legal guardianship of parents who express no interest in exercising their guardianship rights, despite constant encouragement to do so. The Director of this home must take responsibility for day-to-day decisions involving the child's life, such as consent to medical treatment, or school outings, notwithstanding that he is not in a legal sense the guardian of a child.

148. Community Welfare Act, 1972-1975 (S.A.), s.40(2).