

CHAPTER 3

ROLE AND RESPONSIBILITY OF THE COMMONWEALTH GOVERNMENT

3.1 Historically, public responsibility for child welfare matters, particularly the provision of substitute care for children, has rested with State governments both in the delivery of child welfare services and the supervision and subsidisation of non-government sector activities. It has only been in recent times that responsibility for the funding and administration of certain substitute care programs and related welfare services for children and their families has been shared between the Commonwealth and the States.

Development of the Commonwealth's role

3.2 The Commonwealth Government entered the field of child welfare in 1941 by introducing a national scheme of child endowment which provided direct financial support to all parents to assist in the maintenance of dependent children.¹ The introduction in 1942 of a uniform taxation system under Commonwealth control gave the Commonwealth increased financial capacity, permitting it to intervene in many areas once held to be the exclusive constitutional domain of the States, including the area of child welfare. During World War II the Commonwealth Government extended its role when it gave temporary assistance to organisations to subsidise costs incurred in expanding their services to provide care for the children of women working in essential industries.

3.3 While the basis of the States' responsibility for child welfare was the care and protection of children, the Commonwealth's role in the development of services for children and the provision of financial assistance for families was at that time perceived to be in the national interest. For example, during the Second World War the provision of assistance for the care of children was seen as a means of enabling women to enter the workforce and thus increase and sustain the war effort. It was also the case in the 1950s and 1960s when the Commonwealth was concerned to obtain full economic value from its immigration program and later in the 1960s to find a new source of labour for an expanding economy.²

3.4 It has been argued that the entry of the Commonwealth into the child welfare field was both tentative and instrumentalist — tentative because the Government presented its role as one of encouragement and assistance, or supplementation, while at the same time disclaiming any responsibility; and instrumentalist because it legitimised the entry of women into the workforce which traditionally had been regarded as being in conflict with their 'primary roles' as wives and mothers. Commonwealth interest in such matters as child care was therefore seen as a means to an end rather than an end in itself.³

3.5 As commented in the previous chapter, it was not until the 1970s that pressure was brought to bear on the Commonwealth Government to direct more attention and financial assistance towards the family, and particularly the child in the family.⁴ This resulted in a number of initiatives being taken at the federal level during the early 1970s, including the passing of the *Child Care Act* 1972, the introduction in 1973 of income maintenance payments for single parents supporting children (then known as the Supporting Mother's Benefit), the establishment of the Social Welfare Commission in 1973, the establishment of the Interim Committee of the Children's Commission in 1974, the passing of the *Children's Commission Act* 1975⁵ and the *Family Law Act* 1975, and the establishment of the Children's Services Program in 1976. During this period demands were also made for the development of a national family policy, reflecting growing acceptance of the view that the provision of assistance to families with dependent children was not only a government responsibility but, in effect, a national responsibility.⁶

3.6 In 1981, recognition of the Commonwealth's obligation to provide services for children and families was endorsed statutorily with the passing of the *Human Rights Commission Act* 1981. This Act incorporated the United Nations Covenant on Civil and Political Rights which states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. It also outlines the State's obligation to the child: namely, that 'the child shall have ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'. When read in conjunction with the Declaration of the Rights of the Child, which is also incorporated in the Act, protection of the child includes the right '(to) be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration'. On the passing of this legislation the Commonwealth acquired a clear mandate for the promotion at the national level of the well-being of the child and the stability of the family.

Constitutional basis for the Commonwealth's role

3.7 Matters on which the Commonwealth can make laws are set out in the Constitution, chiefly in section 51. Although the Commonwealth has become increasingly involved in the child welfare area in recent years, albeit gradually and haphazardly, there is no specific constitutional power given to the Commonwealth in the area of child welfare.⁷ Possible constitutional bases for the Commonwealth Government's involvement in child welfare matters can, however, be found in various sections of the Constitution; namely, sections 51(xxi), 51(xxii), 51(xxiiiA), 51(xxxvii), 81 and 96. Sections 51 (xxi) and (xxii) possibly provide the most direct role for the Commonwealth in this area by empowering the federal Parliament to make laws in respect of 'Marriage' and 'Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants', respectively.

3.8 On the basis of sections 51 (xxi) and (xxii), the Commonwealth has enacted the Family Law Act which gives it jurisdiction over the custody and maintenance of children where these matters fall within the ambit of the Act. Constitutional coverage does not, however, extend under the Act to all possible custody and maintenance disputes. The Act states that the parties to a marriage have the joint custody of a 'child of the marriage' until the child reaches the age of 18 years⁸, which means that custody or maintenance cases that are not concerned with a 'child of the marriage' (e.g. children of de facto relationships), are outside the ambit of the Act and remain within the legal jurisdiction of the States.⁹

3.9 Following amendment of the Act in 1983, the definition of a child of the marriage was extended in an effort to take the Commonwealth's power in this area to its constitutional limit.¹⁰ Under the *Family Law Amendment Act* 1983, the categories of children deemed to be children of the marriage were expanded to include children of either of the parents, or a child who had been previously adopted by either of them, provided the child was a member of the household of the husband and wife at the relevant time, or was a child who was treated by the husband and wife as a child of their family.¹¹ The revised definition still excludes children of de facto couples, and seems also to exclude children of single mothers and orphaned children who were never subject to the Family Court's jurisdiction while their parents were alive. Custody disputes concerning these children continue to take place in State courts.¹² The 1983 amendment was introduced following the unsuccessful attempt at the Constitutional Convention held that year to secure support for amending the Constitution to bring all custody and maintenance matters within the Commonwealth's jurisdiction and thus avoid the unfortunate situation of some children in a household having their custody determined in a State court, while other children of the same household are subject to the jurisdiction of the Family Court.

3.10 The Family Law Amendment Act further increased Commonwealth control over children of marriages by giving the Family Court jurisdiction to make a child of the marriage a ward of the court. This was achieved by adding 'welfare of the child' to the list of matters concerning the custody, guardianship or maintenance of children in respect of which proceedings under the Family Law Act can be instituted. This has given the Family Court powers that have traditionally been exercised by State Supreme Courts within their wardship jurisdictions. It can, for example, administer a child's property, order that a child not associate with given persons, and protect a child from unwarranted medical procedures. Section 10 of the Family Law Act was also amended by the 1983 Act to make it clear that the Family Court has no power to make a custody order which would override an order made under State child welfare legislation committing a child to the guardianship of a State Minister. The Act also inserted for the first time a definition of 'custody' and 'guardianship' which are the terms used in section 51(xxii) of the Constitution.¹³ The amendments made by the 1983 Act represent one view of the extent of the Commonwealth's power flowing from section 51(xxii). As yet, these extensions are largely untested although the High Court considered certain aspects of the amendments in Cormick's case heard in August 1984.¹⁴

3.11 On the basis of section 51(xxii) the powers of the Commonwealth over the welfare of children are thus limited to the extent that they are tied to divorce and matrimonial causes and the regulation of the custody and guardianship of children in these cases.¹⁵ The Commonwealth cannot, for example, regulate the custody of children where breaches of the criminal law are involved. These remain matters for State law. Children of Aboriginal tribal marriages are also excluded from the Family Court's jurisdiction and the Family Court has restricted power to consider custody applications by third parties (e.g. grandparents) against a child's parents.¹⁶

3.12 Section 51(xxiiiA) provides the Commonwealth Parliament with the power to make laws for 'The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students, and family allowances'. The extent of this power was examined in the case, *British Medical Association v. The Commonwealth*.¹⁷ Although the main issue in the case concerned the meaning of civil conscription, the extent of the Commonwealth's power was also discussed generally. A majority of the Court held that the power conferred on the Commonwealth by this section was limited to the provision of benefits. As stated by Latham CJ, 'The power is not a power to make laws with respect to, e.g. pharmaceutical benefits and medical services. It is a power to make laws with respect to the provision of such benefits and services. A power to make laws with respect to medical services might well be held to be a power which would authorize a law providing for the complete control of medical services rendered by any person to any other person and so would enable the legislature to control the practice of the medical profession completely or to such less extent as Parliament might think proper.'¹⁸ In other words, it was held that while the Commonwealth may well be able to provide medical and pharmaceutical benefits to the public, it was not able to regulate the sale of pharmaceuticals or control the medical or pharmaceutical industries.¹⁹ Similarly, while the provision within the Constitution governing child endowment gives the Commonwealth some power with regard to children, it seems to be limited to the payment of direct financial assistance.

3.13 Other doubts have been expressed as to the extent to which this power can be used beyond making direct cash payments. McMillan, Evans and Storey have argued that while it is clear the Commonwealth can, in addition to making cash payments, provide some services and facilities, it is not clear what the full extent of the Commonwealth's power in this area is. For instance, it has been questioned whether the Commonwealth can provide

or directly fund re-training schemes, domiciliary care, and housing assistance for homeless persons. Similarly, doubts have been raised as to how far the Commonwealth can broaden its function beyond assisting needy individuals, to assisting welfare target groups or even whole communities. There is also a doubt as to whether it can establish or directly fund such services and facilities as child care centres, women's refuges, family planning services, accommodation for the disabled, school to work transition programs, and community development or assistance projects.³⁰

3.14 While it seems that legislation such as the *Homeless Persons' Assistance Act 1974* which makes provision for the payment of grants to organisations providing food and accommodation for homeless people (including, as required by the Act, children over 16 years of age) is based on section 51(xxiiiA), some commentators, including the former Attorney-General, Senator Gareth Evans, have expressed doubts as to where it fits into the structure of the section.³¹ If this Act is validly based on section 51(xxiiiA), it would appear to extend the section's understood meaning. Such an extension would therefore enable the Commonwealth to enact similar laws for the benefit of all children in need.³²

3.15 A further potential source of legislative power for the Commonwealth within the child welfare area could flow from section 51(xxxvii) of the Constitution. Under this section it is possible for the States to refer law making powers to the Commonwealth. One of the referenda voted on at the 1984 December federal election proposed the insertion of a new provision in the Constitution expanding this section and permitting certain powers to be transferred between the Commonwealth and the States. This referendum was defeated. In the past, the States have, however, referred some powers to the Commonwealth. These have mainly been during wartime and most State Acts referring matters to the Commonwealth have now either expired or been repealed. Nevertheless, it is open to the States to refer aspects of child welfare to the Commonwealth.³³

3.16 Given a liberal interpretation of the Commonwealth's appropriations power derived from section 81 of the Constitution, it is possible for the Commonwealth to finance activities which do not fall directly within its power. Section 81 states that 'All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution'. The issue of what constitutes the 'purposes of the Commonwealth' was discussed in the *Australian Assistance Plan* case in 1975.³⁴ Under the Plan, Commonwealth funds were to be disbursed directly to regional councils throughout Australia to be spent on regionally-based social welfare programs devised by the councils themselves. Opponents of the Plan argued that the range of services to be administered by the councils extended beyond the matters upon which the Commonwealth could legislate.³⁵ A majority of the judges who considered this aspect of the case held that 'the purposes of the Commonwealth were not limited to powers given to the Commonwealth in the Constitution'.³⁶ They maintained it was up to Parliament to determine the 'purposes of the Commonwealth' for the operation of section 81.

3.17 Since then the case has been taken to signify a broader interpretation of the Commonwealth's appropriations power. It seems that this power could enable direct grants to be made to child welfare bodies. It has been argued that direct funding is sometimes more appropriate than using section 96 grants to the States because it avoids 'damaging and wasteful duplication, fragmentation, expense and political wrangling'.³⁷ However, the use of section 81 in a manner that is perceived by the States to infringe upon their rights may well create problems of its own. The extent to which this awareness modifies the Commonwealth's approach towards funding through section 81 is the measure of the limitation of the Commonwealth's powers under this section.

3.18 Under section 96 of the Constitution, the Commonwealth has considerable regulatory control in certain areas such as education despite the fact that it has no specific constitutional legislative power in this field.³⁸ This section provides that 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'. It is therefore possible, for example, for the Commonwealth to control the provision of child care services by making grants to the States, specifying exactly how the money is to be spent.

3.19 In effect, virtually any purposes and conditions can be imposed on a grant, including the stipulation that the States make a matching grant. These purposes and conditions are not limited to matters over which the Commonwealth has exclusive or concurrent constitutional power; a Minister can use his executive power to impose conditions on grants without reference to Parliament. However, the acceptance by the States of monies earmarked in this way, is an act of choice; the Commonwealth has no power to compel the States to accept and the States have not always taken up the option. The power of the Commonwealth derived through the use of section 96 is, to this extent, determined by the States. The reliance of the States on federal funds to finance their social welfare programs, combined with the power of the Commonwealth to make section 96 grants for virtually any purpose and on any conditions, has allowed the Commonwealth to intervene in many aspects of welfare once held to be the exclusive constitutional province of the States.

3.20 The Commonwealth also derives authority over child welfare matters through provisions contained in the Constitution regarding Aboriginals, the Territories and immigrants. Under section 51(xxvi) of the Constitution, the Commonwealth may make special laws on behalf of Aboriginal people.³⁹ However, the full extent of the Commonwealth's powers in this area, including its power to act on behalf of Aboriginal children, has not been exercised to date. Under sections 52(i) and 122, the Commonwealth has responsibility for the welfare of children in the Australian Capital Territory and, until 1978, the Northern Territory. Child welfare is now one of the matters for which the Northern Territory Legislative Assembly is directly responsible pursuant to arrangements made by the Commonwealth for self-government in the Territory following the enactment of the *Northern Territory (Self-Government) Act 1978*. Under section 51(xxvii), the Minister for Immigration and Ethnic Affairs has conferred on him an official guardianship role in relation to unaccompanied refugee minors.

Present forms of Commonwealth Government assistance

3.21 Within this constitutional framework, the Commonwealth currently provides a range of direct cash payments either on a universal basis to families with dependent children or to particular groups such as single parents, families with disabled children, persons supporting orphans and low income families. The Commonwealth also allocates funds for the provision of a range of in-kind benefits that are made available to families with dependent children through a network of community-based child care and family support services. These forms of direct and indirect assistance reflect the development of preventive policies and programs that are intended both to support the family unit and to assist some families to care better for the needs of their children and avoid the necessity of relinquishing their children to the care of the State or non-government welfare organisations.

3.22 Income support payments provided directly by the Commonwealth include the Family Allowance, the Supporting Parent's Benefit, the Family Income Supplement, the Handicapped Child's Allowance, and the Mobility Allowance. Other forms of direct financial assistance include additional payments for particular welfare beneficiaries who have children in their care such as widows, invalids and the unemployed; taxation concessions available to income earners with children; and assistance provided through special programs designed to help families meet their housing needs. The Commonwealth Government also provides a Double Orphan's Pension to assist in the provision of care for a child without parents. A secondary objective of this benefit is to provide some financial incentive for families to care for orphans, rather than placing them in institutional care. Details of the above measures are given in Appendix 5.

3.23 Financial assistance allocated by the Commonwealth for community-based child care and family support services is administered through the Children's Services Program. This program was introduced in 1976, although the Government first gave recognition to its intention to assist families with dependent children in this way when it introduced the Child Care Act in 1972.³⁰ (For an account of the historical development of the Commonwealth's role in this area see Appendix 7.) Participation by the Commonwealth through the Children's Services Program has had an important impact on the provision of substitute care services insofar as it has lent support to the prevailing emphasis on the need for the development of preventive welfare services and has contributed indirectly to reducing the number of children placed in institutional or other forms of substitute care. The Commonwealth's role in this area is discussed further in Chapter 7, 'The Children's Services Program and Preventive Services'.

3.24 The Commonwealth also provides financial assistance to organisations responsible for the provision of institutional and other forms of substitute care through a number of specific purpose programs. These include the Children in Residential Institutions Program, grants to nursing homes and hospitals, grants provided for Aboriginal child welfare, the Handicapped Children's Benefit and the Handicapped Persons Welfare Program. These programs are discussed in subsequent chapters and Appendix 6. Organisations and individuals (e.g. foster parents) providing substitute care are also eligible for direct Commonwealth financial assistance through the Family Allowance and the Double Orphan's Pension. Details of these payments are also given in Appendix 6.

3.25 In addition to these forms of assistance, the Commonwealth Government supports a number of other child and family services, including family planning associations, marriage counselling services and pre-marital education programs. It also funds the operation and research activities of the Institute of Family Studies³¹, supports the Child Accident Prevention Foundation of Australia³² and, under the Supported Accommodation Assistance Program, provides financial assistance towards the capital and operating costs of non-profit voluntary welfare organisations and local government agencies which provide temporary accommodation, meals and welfare services for homeless people, including homeless young people aged from 16 to 25 years.

3.26 Finally, as part of its responsibility for child welfare in the Australian Capital Territory, the Commonwealth Minister for Territories has conferred on him an official guardianship role for wards of the Australian Capital Territory. The Commonwealth is also directly responsible for two residential care centres in the Territory — the Quamby Remand Centre and the Belconnen Remand Centre — the only residential care institutions under the immediate control of the Commonwealth.³³ In 1981 the Australian Law Reform Commission tabled a report in the federal Parliament on child welfare in the Australian Capital Territory and recommended the introduction of a new ordinance designed to cover both protective and corrective aspects of child care in the Territory.³⁴ It is understood that

the Commonwealth Government is moving towards the implementation of this recommendation. In part, this move can be seen as the Commonwealth setting an example to the States for what it believes to be appropriate and adequate legislation governing the well-being of children.

ENDNOTES

1. Prior to World War II, financial assistance was appropriated by the Commonwealth during the late 1930s for the establishment of a Lady Gowrie Child Care Centre in each State for the purpose of providing a 'model' child health and education program.
2. During the late 1960s the Commonwealth introduced scholarships for trainee pre-school teachers and provided capital funds to assist pre-school teacher training colleges to expand in order to meet increased student-teacher enrolments.
3. T. Sweeney and A. Jamrozik, *Services for Young Children: Welfare Service or Social Parenthood?* SWRC Reports and Proceedings No. 19, Social Welfare Research Centre, University of New South Wales, Sydney, March 1982.
4. The economic boom of this period also created a demand for female labour which in turn led to the emergence of the growing problem of 'latchkey' children.
5. The *Children's Commission Act* 1975 was assented to on 11 June 1975 but was never proclaimed.
6. The notion of a national family policy and the view that the provision of assistance to families was the responsibility of government were not new. A number of European countries already had family policies, some more broadly based than others. In Australia, the need for such a policy was identified by the Commission of Inquiry into Poverty (1972-76); the Social Welfare Commission (1973-75); the Interim Committee of the Children's Commission (1974); and the Royal Commission on Human Relationships (1974-77).
7. L. Ward, *Commonwealth Powers Over Childcare*, Legislative Research Service, Parliamentary Library, October 1984, p. 1. See also Department of Education and Youth Affairs, *Children and Young People in Institutional Care*, June 1984.
8. See section 61(1) of the *Family Law Act* 1975. Section 73 makes a similar provision in relation to maintenance. Under section 5(1) of the Act a 'child of the marriage' was deemed to be a child born to both parties after the marriage and also 'a child adopted since the marriage by the husband and wife; or a child of the husband and wife born before the marriage'.
9. De facto relationships are not regarded as marriages under the Family Law Act. A child of a de facto relationship can only be considered a 'child of the marriage' and therefore subject to the Act if one of the partners subsequently marries.
10. *Family Law Amendment Act* 1983, sections 5 and 5A.
11. In particular, the new Act covers ex-nuptial children of either the husband or the wife where the child is at the relevant time ordinarily a member of their household; a child who has been and is at the relevant time treated by the husband and wife as a member of their family if at the relevant time that child is ordinarily a member of their household (this would include a child from either the husband's or wife's previous marriage and could possibly include a foster child); and a child born to the mother as a result of a medical procedure (defined as either artificial insemination or the implantation of an embryo).
12. Ward, *op. cit.*, p. 7.
13. Section 60A of the Act defines 'custody' as pertaining to 'daily care and control', whereas 'guardianship' is defined as everything not so specified.
14. In the case *Cormick v. Cormick*, the High Court considered the validity of paragraph 5(1)(f) of the Act concerning children not born to or adopted by either spouse, but living as a member of the household. In this case, which did not involve divorce proceedings, Mrs Cormick sought custody of a child born to her unmarried daughter arguing that she had raised the child as one of her own children. The High Court held that paragraph 5(1)(f) was not a valid exercise of the Commonwealth's power over marriage. As a consequence paragraph 5(1)(f) was invalidated in relation to non-divorce custody disputes although it still could be operative in relation to divorce custody disputes.
15. Ward, *op. cit.*, p. 9.
16. Section 61(4) of the Family Law Act exceptionally allows the Court to decide on custody between third parties and a parent, where the other parent, having obtained a custody order over the child, has died: see for example, *St Clair v. Nicholson* (1981) 33 ALR 537. The Family Court may also have jurisdiction under section 4 (definition of 'matrimonial cause' paragraph (f)), in restricted cases, see for example, *Fountain v. Alexander* (1982) 40 ALR 441.
17. *British Medical Association v. The Commonwealth* (1949) 79 CLR 201.
18. *ibid.*, 242.
19. Ward, *op. cit.*, p. 10.
20. J. McMillan and others, *Australia's Constitution: Time for Change?* George Allen and Unwin, Sydney, 1983, pp. 88-89.
21. M. Crommelin and G. Evans, 'Explorations and Adventures with Commonwealth Powers' in G. Evans (ed.) *Labor and the Constitution 1972-1975*, Heinemann, Melbourne, 1977, p. 38.
22. Ward, *op. cit.*, p. 12.
23. *ibid.*, p. 2.
24. *Victoria v. The Commonwealth* (1975) 134 CLR 338. The case involved a successful challenge by the Victorian Government to the Commonwealth Government's proposed Australian Assistance Plan.
25. McMillan and others, *op. cit.*, p. 84.
26. *Victoria v. The Commonwealth* (1975) 134 CLR 338.

27. McMillan and others, op. cit., p. 89.
28. The Constitution confers no explicit (exclusive or concurrent) powers on the Parliament with respect to education.
29. Prior to amending the Constitution in 1967 through the *Constitutional Alteration (Aboriginals) Act 1967*, section 51(xxvi) of the Constitution allowed the Commonwealth to legislate with respect to 'The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.
30. The Child Care Act was assented to on 2 November 1972.
31. The Commonwealth allocated \$1.3 million to the Institute of Family Studies for the financial year 1984-85.
32. The Child Accident Prevention Foundation of Australia was established in 1979 by a group of paediatric surgeons, lawyers and other concerned individuals for the purpose of increasing public awareness of child safety and accident prevention. Funds for the Foundation are received from both Commonwealth and State governments, the business sector and the public. Before the 1980 federal election the Fraser Government announced it would establish a new National Children's Foundation concerned with matters relating to the well-being of children and families. A major aim of the Foundation was to provide a national focus for child abuse. Negotiations aimed at establishing the Foundation were, however, unsuccessful.
33. The Commonwealth Minister for Health also has responsibility for the delivery of services for mentally and physically disabled children in the Australian Capital Territory.
34. Australian Law Reform Commission (Dr J.A. Seymour, Commissioner). *Child Welfare*, Report No. 18, AGPS, Canberra, 1981.