care and attention, but it does not seem to me to admit that the care and attention is constant, on the part of the person having custody etc. of the child, when the custody, and the required care and attention, are handed over to others, whether at school, or, as first occurred, at pre-school.

Moreover, the attendance at school also failed to satisfy the further requirement in s.105JA that the care and attention be provided in a private home.

The reasoning in *Schramm* had clear application in the present case according to the AAT and so disqualified the applicants from receiving the allowance.

The AAT found it unnecessary to pursue the issue of the financial hardship suffered by the Gilbys.

Formal decision

The AAT affirmed the decision under review.

GARDNER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W82/55)

Decided: 4 August 1983 by C.D. Clarkson

Sheila Gardner asked the AAT to review a DSS refusal of handicapped child's allowance for her two children.

The legislation

Section 105J of the *Social Security Act* provides that:

> . . . where a person who has the custody, care and control of a severely handicapped child provides, in a private home that is the residence of that person and of that child, constant care and attention in respect of that child, that person is qualified to recieve a handicapped child's allowance in respect of that child.

Section 105JA reads:

> The Director-General may grant a handicapped child's allowance in respect of a handicapped child to a person having the custody, care and control of the child if the Director-General is satisfied that the person –
>
> (a) provides, in a private home that is the residence of that person and of that child, care and attention in respect of that child only marginally less than the care and attention that the child would need if he were a severely handicapped child; and
>
> (b) is by reason of the provisions of that care and attention, subjected to severe financial hardship.

Handicapped child: care in the home

Both of the applicant's children suffered from asthma and allergic conditions. They were classed as 'handicapped'. Thus the eligibility of the applicant for handicapped child's allowance fell for determination under s.105JA.

That section required the applicant to provide care and attention very close to the constant care and attention referred to in s.105J, and that care was to be provided in the residence of the applicant and the children.

The applicant's children attended normal school thus being absent from home from 8 a.m. to 3.45 p.m. during school terms. They also went swimming and at least once a week socialised away from home.

The AAT thus formed the view that quite apart from the issue of whether the care provided was close to the constancy as required by the Act, the claim failed under s.105JA(a) as the care was not provided in the home.

Formal decision

The AAT affirmed the decision under review.

Overpayment

BRAKENRIDGE and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. S83/13)

Decided: 17 August 1982 by I.R. Thompson

The applicant was the father of seven children. His two youngest daughters were adopted by his sister and a third daughter went to live with that sister from June or July 1980 onwards. [The applicant was deserted by his wife but had remarried and this daughter apparently did not get on with her stepmother.]

Brakenridge had been in receipt of family allowance in respect of this daughter since January 1978 until 14 April 1981. His sister applied for family allowance in respect of this daughter on 18 February 1981. This was granted from 15 February 1981 to 14 April 1981 (when the daughter turned 16). However, Brakenridge continued to receive family allowance for this daughter. Thus from 15 February 1981 to 14 April 1981 the DSS claimed he had been overpaid $52. They decided to recover overpayment by deductions from his invalid pension under s.140(2) of the Act. He applied to the AAT for review of that decision.

The legislation

Section 95 of the *Social Security Act* provides:

> (1) . . . a person who has the custody, care and control of a child (not being a child who is an inmate of an institution of which children are inmates) is qualified to receive a family allowance in respect of each such child in accordance with this section.

Necessity for custody, care and control

A person who has only care, or only care and control of a child is not eligible to receive family allowance (see *Dowling* (1982) 8 *SSR* 80). Custody is also necessary.

Brakenridge had a legal right to custody of his daughter, however when she moved to her aunt's house he no longer had care or control. The fact that she visited him frequently and was bought food and clothes on these occassions did not alter that conclusion. He accordingly was not qualified to recieve family allowance at the relevant time.

Discretion to recover

Was the decision to recover the overpayment by deduction from the applicant's invalid pension the correct or preferable decision?

The factors to be taken into account in the exercise of the discretion to recover in s.140(2) were the administrative error in paying the allowance both to the applicant and his sister, any acts or omissions of the applicant contributing to the overpayment, (and whether they were deliberate), and any hardship caused to the applicant if recovery was made.

The applicant had failed to notify the DSS that his daughter had left home in respect of the period of family allowance payment from 15 February to 14 March 1981. However, a DSS officer had interviewed the applicant and had been told that his daughter no longer lived with him prior to the payment of family allowance up to 14 April 1981.

The amount of overpayment was very small – $52. Having regard to the total income of the applicant's household – one daughter received a supporting parent's benefit, another received unemployment benefit and his wife was entitled to a wife's pension – a deduction of $5 per week should not cause undue hardship, concluded the Tribunal.

Thus the discretion in s.140(2) as to recovery (see *Hales* (1983) 13 *SSR* 136) should be exercised to recover the overpayment.

Formal decision

The AAT affirmed the decision under review.

MORTON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W82/28)

Decided: 22 July 1983 by G.D. Clarkson.

The AAT *affirmed* a DSS decision to recover an overpayment of wife's pension in the sum of $1857.70 by deductions with the (consented) amendment that those deductions be $10 per fortnight (and not $15 as originally decided by the Department).

The overpayment resulted from the abandonment by the DSS of its annual review of pensions between 1974 and 1979 and the failure of the applicant to notify increases in income.

The Tribunal could *not* find a reason for reducing the total amount claimed such as a failure on the part of the DSS to act on information it obtained regarding the applicant's wages between May 1979 and September 1981. In fact, no overpayment was made in that period and so the total amount claimed by the DSS was recoverable.

A P and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W82/7)

Decided: 22 July 1983 by G.D. Clarkson.

The applicant applied to the AAT for review of a DSS decision to recover from her an overpayment of $3480.20 in invalid pension. Recovery was claimed under s.140(2) of the *Social Security Act* by deductions of $12 per fortnight.

The facts

The applicant had an 'extraordinary' medical history consisting of many and various conditions. She spent a substantial amount of time in hospital.

In June 1979 her husband instituted divorce proceedings which alledged separation in 1971. The applicant denied separation from that date alleging the separation was in 1979. In May 1980 the husband instituted new proceedings alleging separation in December 1978.

The applicant had been in receipt of invalid pension since 1973. Between 1974 and 1979 the Department had abandoned its regular reviews of benefits but in May 1979 these reviews were resumed which in the applicant's case led to a reduction in her pension having regard to the income of her husband.

In February 1980 the DSS wrote to the applicant enquiring as to the date of the separation and the present state of the divorce proceedings. The applicant replied to the DSS in February 1980, stating that she had separated from her husband in March 1979. It was not until September 1980 that the DSS wrote to the applicant informing her that an overpayment (calculated on the basis of her date of separation) of $4202.60 would be recovered from her by deductions from her pension.

Exercise of discretion not to recover

The DSS in decicing to recover by deduction under s.140(2) appeared, said the AAT, to have done so without reference to the fact that the discretion in that section could be exercised in the applicant's favour. The DSS merely pointed to the failure to notify changes in income (as required by s.45(2)) and then stated that an overpayment had therefore been made and was recoverable.

The AAT concluded that the discretion in s.140(2) should have been exercised so as not to pursue recovery.

Her financial position was extremely difficult having regard to medical and nursing home expenses. Her disposable income after the deduction was $25 per fortnight.

However it was the delay on the part of the DSS in notifying her of the overpayment which was of crucial importance.

Delay in calculating: prejudice to applicant

The delay in calcuation of the overpayment had a disastrous effect on the affairs of the applicant.

In May 1980 she executed a deed under s.87 of the *Family Law Act* accepting $6000 in satisfaction of all claims against her husband (including claims for maintenance and property). This was approved by the Family Court in August 1980.

The AAT summarised the effect of the delay thus:

> . . . in August 1979, letters from a social worker and the applicant's solicitor informed the Department that divorce proceedings had been instituted. At the latest by 14 July 1980 the Department was aware as a result of a written communication from the applicant's husband that a settlement contained in a deed made under s.87 of the *Family Law Court Act* (sic) of financial affairs between the husband and wife was imminent . . .
>
> It was not until 26 September 1980 that the Department wrote to the applicant informing her of the overpayments and of the proposed deductions. . . . there is little doubt that the Family Court would not have approved of the deed if it had known that a debt of some $4200 was about to be raised by the Department against the applicant, since the proposed settlement would have meant that the applicant, a chronic invalid, was in effect surrendering all claims against her husband in respect to property and for future maintenance, for less than $2000. In fact the claim was subsequently reduced to $3480.20.
>
> Clearly some reasonable period must be allowed after the Department receives relevant information before the claim can be calculated and made, but in my view, the delay which occurred in this case was far too long and irreparably prejudiced the applicant's position.

(Reasons, p. 17)

Formal decision

The AAT set aside the decision under review and substituted the decision that no action be taken by deduction under s.140(2) of the Act to recover the overpayments of invalid pension.

DISNALL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/22)

Decided: 22 July 1983 by G.D. Clarkson.

The AAT *affirmed* a DSS decision to recover an overpayment of widow's pension in the sum of $1450.60.

The applicant disputed that she had failed to notify increases in her income as required by s.74(1) of the *Social Security Act*. However, the Department had no record of notifications.

It appeared likely that the applicant had notified the DSS on many occasions, however, it seemed that the relevant occasions on which she had failed to notify had become lost in her general recollection of events.

Unemployment benefit: refusal of referral

REEVES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/43)

Decided: 22 July 1983 by G.D. Clarkson.

On 1 December 1981 Marion Reeves was offered a referral to a position with a building supplies company as a shop assistant. This employment was under a training scheme which provided a subsidy to the employer.

The applicant had been employed under such a scheme in November 1981. That employer had upset her, commenting on her unemployment and that now as a taxpayer he had to support her. Due to this pervious experience Reeves declined the referral to the building supplies company. She did not want another subsidised job unless there was substantial training involved.

The DSS cancelled the applicant's unemployment benefit from 2 December 1981 on the basis that she had 'failed to accept a suitable job offer', thus relying on s.120(1) of the *Social Security Act* which reads (so far as is relevant):

> The Director-General may postpone for such a period as he things fit the date from which an unemployment benefit shall be payable to a person, or may cancel the payment of an unemployment benefit to a person, as the case requires –
>
> (c) if that person has refused or failed, without good and sufficient reason, to accept an offer of employment which the Director-General considers to be suitable . . .

Offer of referral not offer of employment

The AAT made it clear that no job was offered to Reeves. She was only offered an opportunity to apply to the employer for the job. (The CES had listed three persons as being suitable for the job.) 'She did not receive and therefore did not refuse an offer to employ her'. Section 120 had no application in this case. The Tribunal commented:

> In the absence of evidence that the Commonwealth Employment Service was expressly or impliedly authorized by the employer to employ the applicant on the employer's behalf, I am unable to accept that an offer to refer the applicant to a prospective employer who may or may not offer her employment is an offer of employment within the meaning of s.120(1)(c), and it follows I am unable to accept that a statement by the applicant to the effect that she wants a job but not a subsidised job in answer to an offer of referral followed by a statement by the Commonwealth Employment Service officer, that in these circumstances it would be a waste of time going to see the prospective employer, amounts to a refusal or failure to accept an offer of employment under the provisions referred to.

(Reasons, p. 8.)

According to the AAT the case properly fell within the provisions of s.107 (the work test) and s.131 (which gives the Director-General a general power to cancel or suspend a benefit).

Reeves had made four approaches to potential employers in the fortnight after her refusal to accept the referral by