"Stolen generations" court case

Australian government defends forced removal of Aboriginal children

By Brett Stone
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In a court case now finally underway in Australia, the federal government has strenuously defended the past policy of forcibly removing Aboriginal children from their families. The two Aboriginal applicants began giving their testimony on August 10, after months of delays and legal obstruction.

Lorna Cubillo and Peter Gunner, two members of the "Stolen Generations," are suing the government in the Federal Court for compensation for the physical and psychological damage caused by their forced removal when children and their subsequent institutionalisation during the 1940s and 1950s under the official policy of "assimilation".

From 1911 to the 1970s, children in the Northern Territory were separated from their families if they were part-Aboriginal. They were placed in various institutions under the most degrading conditions so that they could be "absorbed" into "white society".

Cubillo was taken from Phillip Creek in 1947, when she was seven or eight years old. She was incarcerated at the Loretta Dixon Home in Darwin, run by the Aboriginal Inland Mission, an inter-denominational Christian organisation. Gunner was seized from Utopia Station in 1956 when he was seven years old. He was incarcerated at the St. Mary's Home in Alice Springs, run by the Anglican Church. Some of their testimony is reported in the accompanying article.

Cubillo was "stolen" under the provisions of the Aboriginals Ordinance of 1918, while Gunner's case was covered by the Welfare Ordinance of 1953. Both regulations gave the government's Department of Native Affairs sweeping rights to interfere in the lives of Aborigines.

The Aboriginal Legal Service Litigation Unit is conducting the legal case on behalf of Cubillo and Gunner, claiming unspecified monetary compensation and also exemplary damages, on the grounds that the actions of the Commonwealth were "disgraceful and reprehensible". The case alleges wrongful imprisonment due to unlawful conduct, breach of duty as guardian, breach of statutory duty, breach of fiduciary duty and breach of duty of care.

Cubillo and Gunner initially filed their claims some three years ago. The first defence statement was made on February 21, 1997, after which the applicants filed amended claims in October 1997. On March 12, 1998 the government's barrister, Daniel Meagher QC announced his intention to apply for summary dismissal, following the court's announcement that a substantial trial might take place.

Meagher formally applied for dismissal on June 5, 1998 and at the same time he applied for and obtained the right to have defence testimony heard on August 3 to 7 last year, dates that had been set aside for opening statements in the case. Because of this, the opening statements were not made until March 1, 1999, when Meagher concluded his remarks by outlining his case for summary dismissal.

Justice O'Laughlin, presiding over the case, handed down a judgment two months later, on April 30, 1999, rejecting the government's bid for dismissal but substantially narrowing the legal grounds of the case. The hearings, scheduled to last for three months, finally began on August 10 in Darwin and after a delay in late August, resumed in Alice Springs on August 30.

The government's lawyers have adamantly defended the policies under which the removals took place. This is in line with the publicly-stated position of today's senior government members, including Prime Minister Howard and Aboriginal Affairs Minister John Herron. The basis of this defence is that those removed benefited by gaining access to education and other advantages that they would otherwise have been denied.

Outlining the government's case, Meagher said documentation would be shown revealing that the policy was beneficial to the removed infants. It met a "very serious welfare problem" whereby both the part-Aboriginal child and the mother became outcasts within the tribal clan. Yet Meagher said it would be wrong to apply the same treatment toward a child in the white community.

Today's defenders of the policy base themselves on the position of Paul Hasluck, who was Minister for Territories when Peter Gunner was removed. Hasluck, a veteran conservative politician, was later elevated to the vice-regal post of Governor-General in 1969. Jack Rush QC, the lawyer for Cubillo and Gunner, cited the following passage in which Hasluck personally endorsed the separation of "half-caste" children from their mothers:

"For many years past under successive governments, the policy has been that where half-caste children are found living in camps full of full-blood natives, they should if possible, be removed to better care so that they have a better opportunity for education. The theory behind it is that if a half-caste child remained with a bush tribe, he will grow up to have neither the full satisfaction in life which the tribal native has, nor the opportunity to advance to any upper status. This policy is applied with care and discretion, and a full recognition on the part of the administration that the mother has the same affections as every woman. The patrol officers are required from time to time, to visit various tribes of full-blood natives, and if it's decided that the advantage of the child would be best served by removal, the patrol officers endeavour to prepare the Aboriginal mother for

eventual separation, and to impress her with the advantages which her child will gain. The objective is to have the child willingly handed over to the custody of the Department of Native Affairs, and where possible, the mother is permitted to accompany the child to make the separation more gradual."

Hasluck's account bears no resemblance to reality. One can only imagine the terrible pressure brought to bear in order to coerce mothers into giving up their children. Legally, at no stage was the removal of Aboriginal children dependent upon parental consent. The 1953 Welfare Ordinance did provide for an effort to obtain consent, but it was only passed in response to the growth of considerable opposition among those officers charged with carrying out the policy.

In 1949 a senior Territory patrol officer, Ted Evans, was given the job of airlifting five Aboriginal children from Wave Hill Station. On his return to Darwin he reported "the removal of the children was accompanied by distressing scenes the like of which I wish never to experience again". This report became widely known and in 1951, Dr. Charles Duguid, a defender of the rights of Aborigines, gave a speech in Adelaide describing the removal of Aboriginal babies as "the most hated task of every patrol officer".

Hasluck's assertion, echoed four decades later by Meagher, that child removal was carried out for welfare purposes conveniently seeks to hide from view the real purpose of the assimilation policy, which was outlined at the first national conference of Aboriginal administrators in 1937. Among those in attendance was Dr. Cecil Cook, former Chief Protector of Aborigines in the Northern Territory, and A. O. Neville, Western Australian Protector of Aborigines. These two individuals were prominent proponents of policies designed to bring about the biological disappearance of Aborigines.

The conference adopted a nation-wide policy for the absorption or biological assimilation of the "half-caste". A. O. Neville asked his colleagues: "Are we to have a population of 1,000,000 blacks in the Commonwealth or are we going to merge them into our white community and eventually forget that there were any Aborigines in Australia?"

The first step towards achieving this goal, by breeding out the colour, and preserving a White Australia, lay in the segregation of the "half-castes" from the "full-bloods" through the systematic removal of part-Aboriginal babies and children from the Aboriginal settlements and camps. This is the fate that befell Lorna Cubillo and Peter Gunner.

The government defends this racist policy today not because of some misguided conception that it benefited Aborigines, but, in the first instance, because of the vast potential costs of compensation. Howard and his ministers also whitewash the policy because their political heritage is traced back to those like Hasluck who formulated and directly enforced it. Even more importantly, "assimilation" was a distinct chapter in the 200-year history of massacres, repression and dispossession directed against the Aboriginal people. Without these policies, the continent's best land could not have been cleared for profitable development.

Nevertheless, the current legal action does not seek to challenge the statutes under which the removals were authorised; it merely claims that those provisions were not properly implemented. This was why Rush quoted Hasluck—to lend credence to the argument that the removals and detentions were unlawful. The legal argument is that Cubillo and Gunner were removed without care and discretion, ignoring the individual circumstances of the children, and that parental consent had not been obtained, thereby contravening the legislation. Moreover, the claim is that while the children were in custody, the care that the Director of Native Affairs was obliged to provide them under the legislation was not forthcoming. The plaintiffs allege that the physical and psychological abuse, to which they were subjected at their respective institutions, represented a denial of what was owed them.

In their original legal submissions, Cubillo and Gunner referred to international principles pointing to the criminality of the Commonwealth's actions. This was an allusion to the UN Genocide Convention. But Justice O'Laughlin dismissed this argument in his ruling on April 30. "The reference in the particulars of claim to 'international principles' concerning the advancement and protection of human rights is not appropriate," he declared. "International treaties are not part of our domestic law."

In fact, the High Court had already laid down this line of reasoning. In the *Kruger* case, nine Aborigines challenged the constitutionality of a statute under which part-Aboriginal children were removed, specifically relating to the deprivation of their rights to practice their tribal religion. This claim fell within the bounds of the UN Genocide Convention. The High Court, in rejecting the claim, maintained that the legislation was enacted in the interests of Aborigines generally.

In his April 30 decision, O'Laughlin also declared, on prompting from Meagher, that the court could not pass judgment on policies that were at the time the accepted norm, even if they were now widely condemned. He said the court could only deal with questions of law.

These rulings represent a legal straitjacketing of the "Stolen Generations". As Professor Colin Tatz has demonstrated in his report, *Genocide in Australia*, produced to substantiate their cases, genocide is an appropriate way to describe the treatment of the Aboriginal people.

O'Laughlin also struck out claims based on unlawful delegation on the part of the administrators and claims for compensation, which he said lacked particularity and centered on loss of entitlement arising from the Land Rights Act.

As the case has unfolded, an obvious contradiction has emerged in the government's case. When Meagher applied to have the case summarily dismissed, he gave several reasons. First, he argued that the Commonwealth had nothing to answer for, because in the case of Cubillo the government played no role in her removal and detention and, in the case of Gunner, parental consent had been obtained.

Secondly, Meagher claimed it was difficult to establish the truth of the events due to the lapse of time. He said Cubillo should have brought her action 37 years ago and Gunner 26 years ago. Because witnesses had died and those still living had impaired memories, it would be manifestly unfair to grant Cubillo and Gunner the extension of time they need to prepare their cases in full.

Now that the case is finally proceeding, the government is promising to provide documentary proof of the benefits of the official policy of removing children. Yet its main arguments have been directed at denying responsibility for what actually happened and at discrediting the evidence of Cubillo, Gunner and their witnesses.