

An inevitable outcome

# Australian court dismisses "Stolen Generations" test case

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An Australian Federal Court judge on August 11 dismissed a test case on the federal government's liability for the "Stolen Generations"—the estimated 30,000 part-Aboriginal children who were forcibly separated from their parents in the first seven decades of the 20th century.

Before a crowded Darwin courtroom, in a nationally-televised judgment, Justice Maurice O'Loughlin ruled that government officials had lawfully taken two Aboriginal children from their families in the 1940s and 1950s. He therefore rejected their claims for compensation from the federal government.

The verdict, however, flowed inexorably from the manner in which the applicants' case was conducted. Instead of challenging the legitimacy of the racist Northern Territory ordinances that authorised the seizure of part-Aboriginal babies and infants, supposedly "in their best interests", the applicants' lawyers based themselves entirely on the claim that, while the ordinances were acceptable, the particular officials involved failed to exercise their "duty of care" in applying them.

By taking this approach, the applicants' legal team adapted itself to the government's official "assimilation" policy. The aim of this policy was to integrate all "half-caste" children into "white society", by removing them from their families and placing them in state or church institutions, while the full-blooded Aboriginal population slowly died out. In this way, all traces of Aboriginal society would eventually disappear.

With no challenge mounted to the ordinances themselves, Justice O'Loughlin was able to state that his ruling was simply based on the particular facts before him. He declared that Lorna Cubillo, 62, and Peter Gunner, 53, had failed to prove that the Commonwealth authorities had ignored their best interests by removing them from their families.

Cubillo and 15 other children were removed from the Phillip Creek Native Settlement in 1947, when she was seven or eight-years-old, by the order of the late Amelia Shankleton, superintendent of the Retta Dixon Home for part-Aboriginal children in Darwin. Gunner, then aged 9, was taken from Utopia Station in 1956 and placed in St Mary's Hostel, a similar facility in Alice Springs. Both wept as they testified about the way they were violently removed from their people.

After four years of legal proceedings and 106 days of hearings that involved 60 witnesses and cost some \$12 million, the verdict has provoked considerable public disgust. Thanks to the Howard government and the lawyers responsible for the test case, Cubillo, Gunner and other "stolen children" were subjected to days of traumatic examination and cross-examination, recounting painful experiences of separation and physical and sexual abuse in institutions, only to have the case dismissed on the narrowest grounds.

For its part, the Howard government initially tried to prevent the evidence from being heard altogether. Its lawyers moved for summary dismissal of the case more than two years ago, as soon as the judge

announced that a full hearing would be held. When that application was finally dismissed, the government's barristers treated Cubillo and Gunner and their witnesses with contempt, continually browbeating them in cross-examination, trying to undermine their credibility and reliability.

In line with the public position of Prime Minister John Howard and Aboriginal Affairs Minister John Herron, the government's representatives flatly defended the policy of seizing Aboriginal children, claiming that those who were removed benefitted from educational and other advantages.

On the other side, the Northern Australia Aboriginal Legal Aid Service, representing Cubillo and Gunner, accepted the validity of the Northern Territory "Aboriginal protection" ordinances, which permitted officials to take care and control of a part-Aboriginal child if "in the Director's opinion, it was necessary or desirable in the interests of the child". The law permitted the Director of Native Affairs to do so against the express wishes of the child's family.

The lawyers argued that while the ordinances did provide for the welfare of Aboriginal children, they were not properly administered. One of their central claims was that officials had breached the ordinances by acting "with a conscious and contumelious disregard for" or "wanton cruel and reckless indifference toward" the welfare and rights of Cubillo and Gunner.

But the applicants' case ignored the genocidal aims of "assimilation". Officially adopted at the federal level in 1937, the assimilation policy was just one chapter in the extermination of the Aboriginal people. In the earliest years of British colonisation, outright massacres were organised. Later, the survivors were herded into reserves and missions, usually Church-run, where many died from European-introduced diseases. Assimilation was aimed, in the words of one of its architects, the Western Australian Protector of Aborigines A.O. Neville, at "merg[ing] them into our white community and eventually forget[ting] that there were any Aborigines in Australia".

The judge's ruling boiled down to two findings. First, he dismissed Cubillo's case on the ground that, while the evidence confirmed that she was forcibly removed, it did not explain the personal motives of those responsible. The relevant officials were all dead and no documents could be found recording the reasons for the removal.

"There is a huge void," O'Loughlin concluded. "We know that Mrs. Cubillo was taken away but we do not know why. The obligation was on Mrs. Cubillo to satisfy the court that the Director [of Native Affairs] failed to act in accordance with the provisions of section 6 [of the Northern Territory Aborigines Ordinance]. As it is, people are dead and the documents, if they ever existed, have been lost."

Second, the judge rejected Gunner's claim, apparently for the opposite reason—that official documents *did* exist. "Most importantly,"

O'Loughlin said, one undated document recorded the thumbprint of Gunner's mother, Topsy Kundrilba, on a form of request asking for Gunner to be taken to St Mary's and given a Western education.

What, however, did that thumbprint, labelled "Topsy," actually signify? In the first place it showed that Gunners' mother, denied access to education, was unable to read or write. Did she understand the document? Was she told that it meant she would never see her son again? Did an official or officials pressure her into placing her mark on the sheet of paper?

Living on a remote cattle station, it is likely that she was coerced or misled. Gunner testified that he was grabbed by two white men and driven off in a truck. Both he and Cubillo recounted many occasions prior to their eventual seizure when relatives had painted them with charcoal to avoid official detection as "half-castes". These accounts hardly fit the picture of mothers willingly handing over their children for life.

According to the judge, other documents indicated that the Director of Native Affairs, through his officers, had "given close consideration to the welfare of the young Peter". This finding also flies in the face of the reality. Any official documents would, as in Gunner's case, invariably record that children were seized in their own best interests, in accordance with the wording of the ordinances.

The judge did not dispute Cubillo's and Gunner's claims that they had suffered terrible sexual, physical and psychological abuse. He accepted Cubillo's evidence that she had been viciously assaulted and was very unhappy and starved for affection in the Retta Dixon Home. Likewise he believed Gunner's evidence that he had "a most unhappy childhood" and was sexually assaulted by a missionary in the St Mary's Hostel. The judge estimated that, had they succeeded in their action against the Commonwealth, Cubillo would have been entitled to \$126,800 in damages and Gunner \$144,000.

Nor did Justice O'Loughlin deny the existence of the "Stolen Generations" in general. "Numerous writings tell tragically of a distressing past," he said at the beginning of his judgment. But, on the basis of the legal arguments presented by the applicants' lawyers, he had no difficulty in supporting the Howard government's assertion that the assimilation policy flowed from a genuine, if misguided, "belief that it was in the best interests of part Aboriginal children to assimilate them into the European mainstream and that the best way to do that was through a western style education".

While expressing sympathy for Cubillo, Gunner and other victims of the policy, the judge concluded that the politicians, bureaucrats and church people of the 1940s and 1950s "thought that they were acting in the best interests of the child" and that therefore "the applicants have not proved that they acted beyond their powers".

Cubillo and Gunner were dragged through a four-year legal nightmare, while their lawyers argued a case that was bound to fail on factual and legal grounds. The question needs to be asked: why didn't they challenge the ordinances themselves, thereby exposing the character of the government's assimilation policy?

The answer is bound up with a definite political agenda. One of the advisers to the case, Northern Territory Associate Dean of Law Matthew Storey, told the *Sydney Morning Herald* that the strategy behind the case had always been to force the federal government to establish a compensation tribunal.

Many in ruling circles—including politicians, business leaders, media owners, clergymen and retired judges—have condemned the Howard government for not establishing a Reparations Tribunal, as recommended three years ago by the federal government's "Bringing Them Home" report into the "Stolen Generations".

Commenting on the outcome of the test case, an August 15 editorial in the *Australian*, Rupert Murdoch's national daily, urged the federal government to follow the lead of countries such as South Africa, Canada

and New Zealand by setting up a compensation and reconciliation tribunal that would settle the claims of the stolen children and their families, making gestures of regret, restitution and rehabilitation.

To a certain extent this position is based on crude financial calculations. If the government capped the compensation payouts that such a tribunal could award, the editorial estimated, the total outlay would come to some \$2 billion, spread out over several years. One prominent supporter of the tribunal scheme, Aboriginal MP and Australian Democrats Senator Aden Ridgeway, has warned that another 1,000 court cases are already in the pipeline, producing a potential legal bill of \$3 billion.

Beyond that, however, sections of the political and business establishment are demanding a solution that will put an end to the "Stolen Generations" issue once and for all, while projecting a suitably humanitarian image. Their concern is that the issue raises ugly questions about the history of Australian capitalism and damages its reputation overseas, particularly in key Asian markets. Moreover, the racist treatment and continuing poor conditions of Aboriginal people cuts across the claims of the Australian government to be intervening in Timor, Fiji and elsewhere in the Asia-Pacific region in order to uphold "human rights".

A Reparations Tribunal could dole out limited compensation to survivors of the "Stolen Generation" while, at the same time, fully exonerating those who bear responsibility, both now and in the past, for the plight of Australia's indigenous population—the Australian capitalist class and its various political representatives. This is what happened in the South African Reparations and Rehabilitation Commission (recommended by the Truth and Reconciliation Commission), the Canadian Healing Foundation (recommended by a Royal Commission on Aboriginal Peoples) and the New Zealand Waitangi Tribunal.

Despite coming under considerable pressure to establish a tribunal, the Howard government has refused point-blank to do so. In the first place, it wants to avoid making any compensation payments at all. Secondly, Howard and his ministers trace their political lineage back to previous Liberal Party leaders such as former Governor-General Paul Hasluck, one of the main advocates and administrators of the assimilation program. Thirdly, and most importantly, the government rests increasingly upon a narrow, right-wing racist constituency in rural and regional areas that is clamouring for even harsher social policies towards the Aboriginal population.



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