

CUBILLO AND GUNNER REVISITED: A QUESTION OF NATIONAL CHARACTER

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'Ten Years Later: *Bringing Them Home* and the Forced Removal of Children' Conference

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I Introduction

In preparing my paper for today, I have gone over some of the evidence of *Cubillo v Commonwealth*¹ and revisited in my mind Utopia Station and Philip Creek.

Peter Gunner, regrettably, is no longer with us – dying without receiving an apology or even recognition from the Federal Government of the great hurt and distress caused by its policy of removal and detention.

I have been asked to speak about litigation – a wide and general topic. Litigation in some ways over the past 20 years has achieved much for Aboriginal people. Yet I would be deluding myself and deceiving you if I tried to hide the failure of the *Cubillo and Gunner* case to make the Commonwealth Government accountable for its policy of removal and detention of part-Aboriginal children in the Northern Territory.

This anniversary, 10 years after the *Bringing Them Home* Report² conducted by Sir Ronald Wilson, does enable a review of issues that, from both a legal and national perspective, are so important to the character and standing of the nation, and so important to a proper understanding of Australian history.

The elapse of time means it is easy to lose inspiration, to extinguish the passion that drives us to do good and address wrongs. Reading the *Cubillo and Gunner* case again motivates me to renew this fight for justice, to achieve an apology and some form of reparation for those that have suffered so much as a consequence of this policy of removal – I hope it has a similar effect on you.

Let me start by reminding you that Justice O'Loughlin, trial judge in *Cubillo and Gunner*, did not find, as the Stolen Generations deniers would have you believe, there were no Stolen Generations. As he stated, 'neither the evidence in this trial, nor the reasons for judgment, deny the existence of "the Stolen Generation"'.³ And well he might have made this comment.

II Lorna Cubillo's Removal

Lorna Cubillo was eight years of age. In 1947, she was at Philip Creek. Philip Creek lies in the heart of the Northern Territory, not far from Tennant Creek and between Alice Springs and Darwin. She attended a rudimentary school. Philip Creek was what was called a ration depot where Aboriginal people would congregate. The Warrumungu people had been forced there after their ancestral lands were taken over by pastoral activity in the 1920s. They were forced there after the 'Coniston massacre' – the last massacre in the Northern Territory when Aborigines were hunted and killed. The fear of this massacre lasted for generations.

Early one morning in July 1947, 16 Aboriginal children were put on the back of an open truck at Philip Creek. Lorna Cubillo was one of those children. The children were told they were going on a picnic. With the crying and wailing of adult Aboriginal people around the truck and in the area, they soon realised that this was not the case.

An aunt of Lorna Cubillo was one of the people near the truck. A female missionary was having a tug of war with Lorna Cubillo's aunt. The missionary was trying to take her baby, who was still being breastfed. Eventually Lorna Cubillo's aunt, distressed and crying, pointed to Lorna on the truck: 'Napangka, you care for this baby', she said, and handed the

baby to Lorna Cubillo on the truck. Lorna Cubillo was eight years old; an eight year old responsible for a baby.

As the truck drove away from Phillip Creek, mothers cut themselves with stones and hit themselves over the head with sticks. Others chased the truck, screaming and yelling. Lorna Cubillo's last memory of Phillip Creek is of those people running after the truck, disappearing in a cloud of dust. The children on the truck were all crying, not knowing where they were being taken. Lorna Cubillo, who had been told of Europeans killing Aborigines, thought she too would be killed.

For three days and two nights, she cared for the baby on the back of the truck as it was driven to Darwin. She was given a blanket. The baby had diarrhoea. She kept folding the blanket into squares until it was so soiled she threw it from the truck. She fed the baby by dribbling water into the baby's mouth. The water was taken from a 44 gallon drum on the back of the truck.

In the Northern Territory, the Government used patrol officers for Aboriginal administration. They had policing powers over Aboriginal people. The patrol officer who drove the truck gave evidence in the *Cubillo and Gunner* case. He described the event, this removal, as a scene he never wished to experience again. But of course, he was only doing his job.

There was no issue of neglect or lack of food or welfare consideration for these children. Lorna Cubillo was in good health and developing as any other normal eight year-old child in that Aboriginal community. She was deeply loved by her family and kin.

From 1947 until 1956, Lorna Cubillo was detained in an institution in Darwin, an institution devoid of love and affection and proper care. She had been removed from a family that did give her love and affection – circumstances from which no white child would have been removed. Moreover, she had been removed into circumstances where lasting psychological harm could be expected.

In the institution in Darwin, physical punishment was the norm. To provide an example of that punishment: Lorna Cubillo gave evidence that, on one occasion in 1955, she was flogged by a male missionary with the buckle end of a belt that caused scarring to her face and the partial severing of a nipple. Her crime was splashing in a creek on the Sabbath.

For the religious zealots who ran the institution, to do such a thing on the Sabbath was deserving of this punishment.

As a consequence of her institutionalisation, Lorna Cubillo lost her language – she could not communicate with her family and Aboriginal mother when she left the institution. Between 1947 and 1955, she had no communication with her family. She was told Aboriginal culture, dances and song were the work of the devil. Lorna in Darwin, her family in Tennant Creek – it was like being on opposite sides of the world. Meanwhile, Lorna's family in Tennant Creek mourned her as if she were dead.

Our Commonwealth Government argued in the Federal Court with great fervour that this was the equivalent of a child going to boarding school.

What did O'Loughlin J find in relation to this incident of removal of Lorna Cubillo? Let me quote from the judgment:

Asked to describe the impact on her when she left Philip Creek on the truck Mrs Cubillo replied:

'I'd been upset and confused and I find it hard to sleep at night. I'll never forget what happened to me on the day I – when I was removed.'

I have no difficulty in accepting this passage from Mrs Cubillo's evidence. She was a young child – no more than 8 years of age. Mrs Cubillo received great comfort from her extended family and the community at the Settlement.⁴

The trial judge found that it would have been a sad and traumatic event, one that would leave a lasting impression on a young mind. He stated, 'Mrs Cubillo said that she has suffered in silence and continues to suffer. I believe her.'⁵

Justice O'Loughlin accepted the hurt and distress caused by such removals. The deniers of the Stolen Generations are perverters of history – in the same bin as the fringe historians who deny the Holocaust. Such conduct can never be excused, no matter when it occurred or whatever the motive used in an attempt to justify it.

III Peter Gunner's Removal

Peter Gunner was brought up at Utopia Station in a very traditional Aboriginal culture. Even in 1950, Utopia Station

had experienced little contact with Europeans. The evidence from witnesses for the Commonwealth, as well as those for Peter Gunner, described him as being loved and cared for in his early years in the same way as any other child. On 6 April 1955, the following note was written by a patrol officer, Mr Kitching, upon a visit to Utopia Station:

On the appearance of any Commonwealth vehicle both mother and child flee, and no contact by officials has been made during past 5 years. ... Not suitable for St Mary's ... The majority of children on Utopia all disappear as quickly as possible, and I have made no attempt to chase them ... It might be added that they are all frightened that they will be taken away to the Bungalow School.⁶

This report was consistent with evidence given of children being hidden by mothers and having their skin covered with charcoal in an effort to disguise them. On 14 September 1955, the same patrol officer wrote:

The two children, Florrie Ware and Peter, were seen with their parents, and it now appears that they will both be willing to attend school and go to St Mary's Hostel in the coming year. ... One consideration which I promised, and which should be honoured, is that they should be allowed to return home for their school holidays.⁷

The evidence of Mr Kitching was that such a promise was made because of the close concern of Peter Gunner's mother for his welfare. He stated in his evidence that it was a promise that should have been honoured.

In May 1956, Peter Gunner was removed from Utopia Station. Justice O'Loughlin accepted that this removal was forcible and in circumstances both frightening and upsetting. The promise of return for school holidays was never honoured.

One of the issues that O'Loughlin J had to decide was the issue of consent. His Honour relied on a formal legal document purporting to bear the thumbprint of Topsy Kundrilba, Peter Gunner's mother. The document was headed 'Form of Consent by a Parent'. It reads, in part:

I, Topsy Kundrilba, being a full blood Aboriginal (female) within the meaning of the *Aboriginals Ordinance 1918–1953* of the Northern Territory ... do hereby request the Director of Native Affairs to declare my son Peter Gunner, aged seven (7) years, to be an Aboriginal within the meaning and for the

purposes of the said *Aboriginals Ordinance*. My reasons for requesting this action by the Director of Native Affairs are:

...

2. I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.

...

4. By placing my son in the care, custody and control of the Director of Native Affairs, the facilities of a standard education will be made available to him by admission to St Mary's Church of England Hostel, Alice Springs.⁸

The judge found the thumbprint on this form to amount to 'informed consent';⁹ consent by a mother who could write no English and, on any view of the evidence, could speak little either. This was consent by a mother who had never travelled beyond the lands of her clan. It provided a basis, in the judgment of O'Loughlin J, for excusing the Commonwealth from liability – it seems that, for the judge, it was the mother sending the son away, not the Commonwealth taking him away.

The document purported to have Peter Gunner placed in the care, custody and control of the Director of Native Affairs for a 'standard European education'.¹⁰

Peter Gunner, at age seven, at the behest of servants and agents of the Commonwealth, was placed in an institution – St Mary's Hostel in Alice Springs. The archdeacon, who was nominally in charge of this hostel, described it in correspondence as presenting facilities 'nothing short of criminal' and no better than 'stinking slum conditions'.¹¹ I quote what the trial judge found in relation to St Mary's Hostel:

The evidence of Mr Gunner and others of children searching for food in rubbish bins and dumps, the lack of social contact with children outside the Hostel, the failure to return him [Peter] to his family during school holidays, the shocking conditions of the Hostel as depicted in the reports from Mrs Ballagh [a welfare officer] and others, the quality of its staff and the conduct of Mr Constable [a missionary who physically and sexually abused Peter] add up to a damning indictment of St Mary's. The documents that were received into evidence were sufficient; they reveal the failure on

the part of St Mary's to staff and administer the Hostel appropriately. St Mary's failed in its management and its care for the children; it also failed in that it did not provide proper and adequate facilities based on the standards of the day.¹²

I remind you that throughout this period of detention at St Mary's, Peter Gunner was in the care, custody and control of the Director of Native Affairs, an officer of the Commonwealth public service.

Peter Gunner was sexually assaulted by Mr Constable, the person charged with the responsibility of caring for young boys at this institution. The evidence disclosed Mr Constable as a serial sexual assaulter. His conduct was appalling. Peter Gunner had never spoken of the incident with Mr Constable until a short time before the trial. The trial judge heard from Mr Constable at the trial – he was called by the Commonwealth. The trial judge found that Mr Constable partook in perverted behaviour amounting to sexual misconduct.¹³

For Peter Gunner, removal at seven years of age meant that he never partook of the necessary ceremonies, never learned the knowledge necessary to be properly accepted as a man within his clan, as his brothers and cousins were and are accepted. He lost his language. He lost contact with his mother.

IV Injury and Loss

In relation to injury, the thrust of the Commonwealth case was that both applicants suffered no injury – that they were in fact spinning a tale, were in effect malingerers after compensation. These assertions were rejected by the trial judge. The trial judge recognised the loss of land and cited a passage from Professor Stanner, a famous Australian anthropologist, to demonstrate that loss:

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggestive though it be, does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre' and much else all in one. ... The Aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. ... A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call 'land'

we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, form part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life, every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.¹⁴

This is what each applicant lost as a consequence of removal by the Commonwealth Government. Justice O'Loughlin went on to state in relation to physical injury:

The evidence has demonstrated that Mrs Cubillo will not recover from her injuries; those injuries may, from time to time, require treatment or counselling. I accept that Mrs Cubillo presented as a stoic woman, a woman who bears pain and injury internally with little complaint. However, that stoicism and lack of complaint do not reduce the significance of her injury nor do they reduce the extent of her damages. Those injuries and losses that she suffered and will continue to suffer flow back to her removal and detention. ... I believe this observation applies with equal force to Mr Gunner.¹⁵

Lorna Cubillo and Peter Gunner were taken from families that loved and cared for them.

V The Policy of Child Removal

Why were these children removed from their families? Because of policy – the policy of child removal of part-Aboriginal children in the Northern Territory. The policy is best reflected in the legislation: the *Aboriginals Act 1918–1953* (NT) (formerly the *Aboriginals Ordinance 1918–1953* (NT)). This legislation gave the Commonwealth Government unprecedented power over Aboriginal people. There is no equivalent legislation in the Commonwealth statute books. To illustrate this point I refer to some of those powers contained in the legislation:

- Aboriginal people could not go into towns without permission;¹⁶
- Aboriginal people could not travel from one part of the

Northern Territory to another without permission;¹⁷

- Aboriginal people could not marry without permission;¹⁸ and
- the ultimate power, Aboriginal parents had no rights in relation to their children. The legislation provided that a senior public servant was the legal guardian of every Aboriginal child.¹⁹ Children could be legally wrenched from families. Aboriginal people were treated as less than human.

This is not the Stolen Generation, in the singular – these are the Stolen Generations. The impact of these policies has been felt by generation after generation. Every Aboriginal community has been affected.

I wish to give you the flavour of the Commonwealth Government's policy by conveying to you directly from some documents that were tendered in the trial. The Chief Protector of Aboriginals in 1912 stated:

No half-caste children should be allowed to remain in any native camp, but they all should be withdrawn ... In some cases, when the child is very young, it must of necessity be accompanied by its mother, but in other cases, even though it may seem cruel to separate the mother and child, it is better to do so when the mother is living, as is usually the case, in a native camp.²⁰

By 1949, a patrol officer had complained of the distressing scenes associated with removal of children. The Secretary of the Northern Territory wrote to the Administrator of the Northern Territory:

I cannot imagine any practice which is more likely to involve the Government in criticism for violation of the present day conception of 'human rights'. Apart from that aspect of the matter, I go further and say that superficially, at least, it is difficult to imagine any practice which is more likely to outrage the feelings of the average observer. ... If children, however, are to be forcibly taken from their mothers despite what Mr Evans calls distressing scenes which he hopes never to experience again, it is of the greatest importance that the Minister's approval for such a policy be readily stated, and further that the administration of such a policy can be shown to be just and considerate.²¹

In 1951, the policy was noted as follows by the then Administrator of the Northern Territory, Frank Wise:

Aborigines are human beings with the same basic affections that we have, and the aboriginal mother has a real love for her children, especially those of tender age. ... We cannot expect the normal aboriginal mother to appreciate the reasons why her part aboriginal child should be taken from her. ... In effecting the removal of part aboriginal children from their mothers these factors must be taken into consideration...²²

Removals went on. The trial judge made the following finding in relation to the policy of child removal: 'Despite the submissions by the Commonwealth to the contrary, I cannot accept that the policy ... meant that a part Aboriginal child could only be removed if his or her mother consented.'²³

VI Reasons Why the Claims of Lorna Cubillo and Peter Gunner Were Dismissed

There were two critical factors in relation to the dismissal of each applicant's claim: the statute of limitations and the independent discretion of the Director of Native Affairs.

A The Statute of Limitations

Although each applicant was found to have met the test for the exercise of discretion to extend time, that discretion was not exercised in their favour. The reason given by the trial judge was that the effluxion of time had so prejudiced the defence of the Commonwealth that it could not obtain a fair trial.²⁴ This finding was made despite the positive findings of fact concerning much of each applicant's claim.

B The Independent Discretion of the Director of Native Affairs

The judge found that the statutory regime provided the Director of Native Affairs with an independent legal discretion.²⁵ In other words his powers were not derived from his employment but came directly from statute. Consequently, said O'Loughlin J, the Commonwealth could not be vicariously responsible for his acts and omissions.²⁶ Thus O'Loughlin J determined that the Commonwealth did not act through the Director and, whilst the Director could be held personally liable for his actions, that responsibility did not extend to the Commonwealth Government.

VII Concluding Comments: Successful Litigation and the Need for Government Action

Cases can be won. The recent case of *Trevorrow v South Australia* (No. 5)²⁷ is an example. In that case, Gray J examined a legislative framework similar to that of the Northern Territory. He held that the statutory officers implementing child removals were an emanation of the state.²⁸ As such, the South Australian Government was responsible for their actions.²⁹ This stands in contrast to the position taken by O'Loughlin J in *Cubillo and Gunner*. In considering a gap of 50 years, Gray J also took a different legal line to O'Loughlin J: the oral evidence supplemented by the voluminous contemporary documents was sufficient to justify a positive exercise of discretion in relation to extending time pursuant to the statute of limitations.³⁰

Estimates of the costs of the *Cubillo and Gunner* litigation vary. It is clear from parliamentary questions that the Commonwealth spent massively³¹. Some estimates of total costs range from \$15 million to \$20 million. I am confident that if this sort of money had been invested in reparations in 1998, the process of healing, together with the issue of compensation, would have been enormously advanced. But this Federal Government, and particularly this Prime Minister, have continually presented a doctrinaire political objection to this idea. True it is that the millions of dollars spent have brought the Government a technical legal victory in *Cubillo and Gunner*, but this court win does not change or reduce the pain or the gravity of the Commonwealth's conduct disclosed in the courtroom and in the *Bringing Them Home* Report.

The whole issue is more than one of long and expensive litigation. As I indicated at the outset, this is not only a legal issue, it is a national issue. Let me put this perspective on it. Australians, particularly our Prime Minister, have a penchant for remembering Australian history that involves war. Only recently our Prime Minister was again in France at the Western Front evoking images of young Australians' bravery, their sacrifices and losses. Of course we are right to remember this history even though the First World War is now almost 100 years old. But are we as a country only able to identify in our history what we consider to be noble and valiant? Are we not diminished as a nation if we cannot recognise the hurt and suffering that has been caused by our governments to our Indigenous people, particularly the issue of removal of children?

I remember the outrage in Australia at reports that history texts for Japanese schoolchildren had effectively re-written the history of the Second World War. References to the atrocities committed by Japanese forces had been totally omitted and justifications for Japan's conduct during the Second World War had been inserted. Those who objected did not object so as to be vindictive or to remind the Japanese of the horrendous conduct of their fathers – a generation now largely dead. The objection was based on the re-writing of history and the complete failure to recognise the great suffering and hurt that had been caused to young Australian men and women. In the same context, is it not reasonable that there should be outrage at the failure of our national government to recognise its ill treatment of generations of Aboriginal families? Is there not strength to the proposition that this Federal Government and its supporters are attempting to ignore or re-write our history?

Despite the conduct that led to the suffering of Lorna Cubillo and Peter Gunner, our Federal Government says it owes them no apology. It is a nonsense to say that this is the conduct of another generation. The Commonwealth Government is a continuing legal entity. It exists from decade to decade. The Commonwealth Government does not die every three years with an election.

If, as a nation, we are to be honest, we will recognise the hurt and distress that has been caused to Indigenous Australians. We will recognise the hurt and distress that is caused by the failure to properly acknowledge our history. This is not to wear a black armband. This is not to dwell on the negative. It is merely to ensure justice and the righting of the wrong.

Endnotes

- * John T Rush QC acted as senior counsel for Lorna Cubillo and Peter Gunner, members of the Stolen Generations, in litigation against the Commonwealth concerning their forced removal from their families as children.
- 1 (2000) 103 FCR 1 (*Cubillo and Gunner*).
- 2 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission (1997) (*Bringing Them Home* Report').
- 3 *Cubillo and Gunner* (2000) 103 FCR 1,12.
- 4 *Ibid* 148–9.

- 5 Ibid 149.
- 6 Ibid 240–1.
- 7 Ibid 242.
- 8 Ibid 243–4.
- 9 Ibid 245.
- 10 Ibid 244.
- 11 Ibid 327.
- 12 Ibid 332.
- 13 Ibid 282, 310.
- 14 Ibid 467–8.
- 15 Ibid 476.
- 16 *Aboriginals Act 1918–1953* (NT) s 50.
- 17 *Aboriginals Act 1918–1953* (NT) s 50.
- 18 *Aboriginals Act 1918–1953* (NT) s 45.
- 19 *Aboriginals Act 1918–1953* (NT) s 7.
- 20 Chief Protector of Aboriginals, quoted in *Cubillo and Gunner* (2000) 103 FCR 1, 62 (O’Loughlin J).
- 21 Secretary of the Northern Territory, quoted in *Cubillo and Gunner* (2000) 103 FCR 1, 62 (O’Loughlin J).
- 22 Administrator of the Northern Territory, quoted in *Cubillo and Gunner* (2000) 103 FCR 1, 80 (O’Loughlin J).
- 23 *Cubillo and Gunner* (2000) 103 FCR 1, 87.
- 24 Ibid 146, 430.
- 25 Ibid 343.
- 26 Ibid 348.
- 27 [2007] SASC 285.
- 28 Ibid [542]–[543].
- 29 Ibid [545]–[546].
- 30 Ibid [921].
- 31 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2001, 24 438 (Michael Danby).