

The Stolen Generation test cases

Kruger v. The Commonwealth

Initially Kruger and Others was pursued in the High Court as part of the strategy of achieving social justice through the legal sphere. The plaintiffs chosen represented individuals from the various institutions where children of mixed descent were placed. There was also a mother of a child removed named on the writ.

We argued that the Aborigines Ordinance 1918-1957 was unconstitutional because it violated a number of rights which should be implied in the Constitution - the right to freedom of movement, freedom of speech, freedom of association. It was also argued that the government had no power to pass a law authorizing genocide.

The growing awareness of Stolen Generation issues and history, as a result of the Going Home Conference and the Kruger litigation in the High Court led to the historic Inquiry into the Forced Removal of Aboriginal and TI Children from their families, also known as the Bringing them Home Report.

Heron's Initiatives

The Federal Government through the Minister of Aboriginal Affairs, Mr John Heron, outlined on 16 December 1997 a number of initiatives in response to the BTHR by the HREOC. Mr Heron announced a \$63 million package over four years.

The Government's package did not address all the recommendations of the BTHR and has received criticism nationally and internationally for failing to make an adequate reparation package which also includes an apology and compensation.



**Plaintiff
Peter
Gunner.**
Photo by
Valerie
Day.

The Stolen Generation Litigation Unit (SGLU) is a separately funded unit within the North Australian Aboriginal Legal Aid Service (NAALAS). Senior Solicitor with SGLU, Koulla Roussos, provides *Balance* with a background to the test cases to date:

We are running two test cases in the Federal Court against the Federal Government, hoping the cases will establish principles of compensation for those removed.

We have briefed, after a tender process, the Melbourne firm Holding Redlich to assist NAALAS in the preparation and presentation of the claims. Holding Redlich has a proven expertise in personal injuries civil litigation of such magnitude. Holding Redlich lawyers and staff are working on a pro bono basis and have prepared the cases for trial in less than three years. Our barristers are Jack Rush QC, Mark Dreyfus and Melinda Richards.

You will recall the Bringing Them Home Report (BTHR) by the Human Rights and Equal Opportunity Commission (HREOC). The Government did not implement all of the Report's recommendations, namely 'apology' and 'monetary compensation'.

Through the current test case litigation, our clients have sought to establish common law grounds of compensation.

It was the Government's refusal to apologize and compensate and significantly some of the Judge's obiter in the case of Kruger that led to our current Federal Court action. Our client group did not think Heron's measures were enough.

Test Cases

In October 1996 the SGLU filed over 750 writs in the High Court, raising issues of negligence, breach of fiduciary duty, breach of guardian, excess of administrative power, breach of statutory duty and false imprisonment.

Claims lodged by Lorna Cubillo and Peter Gunner have been chosen to run as test cases. Success in these cases will serve as a precedent for the SG in the NT. Also they may to a lesser extent

benefit members of the Stolen Generations across the country.

Getting these cases ready for trial has involved going through thousands of documents in the Commonwealth and NT Archives. It has involved interviewing a large number of potential witnesses and many expert witnesses.

Lorna Cubillo - facts alleged

Mrs Cubillo was born at Banka Banka Station north of Tennant Creek in 1939. Her grandmother disguised her light skin by rubbing ash into her body to avoid detection by patrol officers. She was discovered and removed by Commonwealth patrol officers to Philip Creek mission. The mission was set up by the Commonwealth and operated by Aboriginal Inland Mission some 40km north east of Tennant Creek.

At the mission. Mrs Cubillo remembers being segregated from her grandmother and peers. She remembers her mother visiting her from Banka Banka Station. She has told the Court how one day she was placed in the back of an open truck with 16 other aboriginal children of mixed descent and driven to the Retta Dixon Home in Darwin. The children thought they were going on a picnic. The mothers watched the children being driven away. Mrs Cubillo remembers the mothers throwing themselves on the ground weeping and moaning. She has told of her life at the Retta Dixon Home, and of the treatment she received from the missionaries entrusted by the Government to care for her and other children of mixed descent.

Peter Gunner - facts alleged

Mr Peter Gunner grew up at Utopia located some 250kms northeast of Alice Springs. His family hid him under blankets from visiting patrol officers. In 1956 when he was approximately 7 years old, a welfare patrol officer grabbed him and placed him in a truck. He remembers screaming. He remembers being put in the back of a truck, thinking that he was being taken away to be killed.

He was removed initially to "the Bungalow" (the old Telegraph Station) in Alice Springs and then on to St Mary's Hostel, an Anglican mission in Alice Springs. Despite promises to his mother, he was never returned on school holidays. Mr Gunner also told the court of the treatment he received at St Mary's, including regular beatings, food shortages and the lack of other provisions such as clothing and blankets.

The test cases opened in the Federal Court in Darwin, sitting in the Supreme Court of the Northern Territory.

Strike-out application.

At the commencement of the cases on 1 March 1999, the Commonwealth moved an application to have our statements of claim 'struck out' for:

1. Not disclosing a reasonable cause of action, and
2. For being frivolous, vexatious and an abuse of process.

The Court substantially rejected the Commonwealth's application. Justice O'Loughlin found in his reasons that our causes or actions are sustainable in law. In his reasons, O'Loughlin J., stated "...these reasons are of such importance - not only to the individual applicants and to the larger Aboriginal community, but also to the nation as a whole - that nothing short of a determination on the merits with respect to the competing issues of hardship is warranted..."

Our statements of claim were refined through to four areas of law: negligence, breach of fiduciary duty and false imprisonment. The decision is available on the Internet at: www.fedcourt.gov.au.

Support

This is no ordinary litigation. As it will become obvious, it spans the whole of Australian history

and affects clients, witnesses and lawyers involved around Australia. Support and instructions come from a number of people significantly affected by the policy of removal. Many lack the education and self esteem which may enable them to understand and overcome the whole process of litigation.

To overcome some of our

Land Councils to assist us in locating remote witnesses and with providing us with necessary vehicle and other provisions to attend to clients and witnesses who have no access to a telephone or transport;

- Locating appropriate interpreters;
- Locating appropriate literature for counsel on issues ranging from aboriginal kinship to the aboriginal witnesses in



From left: Mark Dreyfus Counsel, Michael Schaefer, Holding Redlich, Luke Brown, Holding Redlich, Nicola Kay, Holding Redlich, Melinda Richards, Counsel, Lorna Cubillo, plaintiff, Jack Rush QC, Counsel, Koulla Roussos, NAALAS. Photo by Mark Mareclis.

logistic difficulties the Unit has endeavoured to provide a service over an above legal assistance. Primarily we have undertaken the following:

- Regular public meetings after hours to appraise our clients of developments;
- Bimonthly newsletter to all our clients in the NT, Australia and overseas;
- Establishing networks with other service providers in NT regional centres to disseminate information, and for use of administrative space and assistance to hold public meetings;
- Establish networks with other individuals who reside close to some of our witnesses who have no access to a telephone or transport;
- Establishing networks with

court;

- Setting up cross cultural workshops for our legal team;
- Establishing a counselling service with the assistance of Aboriginal health organisations. Counsellors have been made available to our leading plaintiffs, to witnesses and others in need. Counsellors have been attending hearings on a daily basis, providing a debriefing session in the morning before court resumes and the afternoon after the adjournment;
- A member of the legal team accompanies the counselling service and provides legal debriefing. We go through the days events and attempt to explain in plain English convoluted legal arguments;
- Use of local, national and international media to dis-

seminate information;

- Assisting our leading plaintiffs with the provision of a person of their choice to accompany them every day in Court and to out of home engagements.

Hearing

Having overcome the strike application, our cases recommenced on August 10, 1999. After a number of preliminaries, Lorna Cubillo gave her evidence, followed by two former inmates of the Retta Dixon Home. Peter Gunner gave his evidence and was cross examined for over four days. The Court moved to Tennant Creek to be given a viewing of the Phillip Creek mission and to take evidence from some of Lorna's family members.

The Court then moved to Alice Springs to take evidence from former inmates of St Marys Home and witnesses from Utopia who remember Peter as a young boy and his removal. The Court then convened in Melbourne to hear evidence from psychiatrists and it is currently sitting in Darwin taking evidence from other experts including an historian and anthropologists. We expect to complete our case in early October.

The Commonwealth has indicated their cases will run for at least eight weeks, after which we envision two weeks of final submissions. Decisions may not be handed down before March 2000.

Extracted from a paper presented to the National Association of Community Legal Centres' Annual Conference, September 9, 1999 in Brisbane: Stolen generation - community action, test case litigation and improving access to justice.

