

RIGHTING THE WRONG

Achieving reparations for the Stolen Generations

John T Rush QC

It is fundamental to the nation that the wrongs exemplified in Cubillo and Gunner v The Commonwealth should be recognised and redressed.

Was it only two years ago that Melbourne and Sydney streets were closed to allow the people of this country, in enormous numbers, to physically express their sorrow and regret at the nation's treatment of Aboriginal people?

Is it only two years since the Aboriginal flag flew at mastheads across the country, that the movement to reconciliation seemed irresistible, that the nation, if not the Prime Minister, recognised the importance of the word 'sorry'?

Such a short time has passed. Yet somehow these issues — so important to the character and standing of the nation, so essential to a proper understanding of Australian history — seem to have lost an impetus. It is so easy to lose inspiration, to extinguish the passion that drives us to do good and address wrongs.

In preparation for this article, I revisited the evidence of the *Cubillo and Gunner v Commonwealth of Australia* case¹ — the life stories of two remarkable people and, critically, the stories which O'Loughlin J, the trial judge, accepted as to the circumstances of their removal and detention. To know of the great hurt and sadness, to hear and read of the devastation, is to want to do something, is to know that it is fundamental to the nation that these wrongs should be recognised and redressed.

The removals of Lorna Cubillo and Peter Gunner

Let me tell you of the evidence of Lorna Cubillo and Peter Gunner — the evidence of the removals of these children from their families, culture and land. I say land because land is vital to the culture and religion of Aboriginal people. For Aboriginal people to be removed from their land or country is a loss of great enormity. Land is life. Land is traditions. Land speaks. It is difficult for us to comprehend the significance of land in Aboriginal culture.

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.

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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' 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 Philip 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 Philip 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 powers of police over Aboriginal people. The patrol officer who drove the truck gave evidence in the 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.

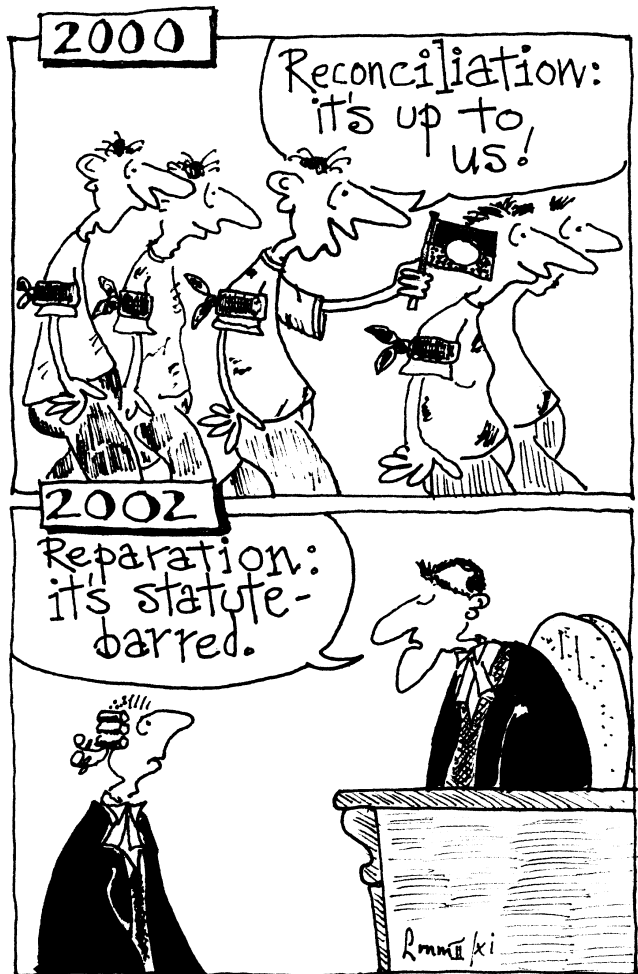
From 1947 until 1956, Lorna Cubillo was detained in an institution in Darwin, an institution devoid of love and affection and proper care. She had been removed from a family that gave that love and affection in circumstances where no white child would have been removed — removed in circumstances where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

In the institution in Darwin, physical punishment was the norm. To give you 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 which caused scarring to her face and the partial severing of a nipple. Her crime was to splash in a creek on a Sunday. For the religious zealots who ran the institution, to do such a thing on Sunday, 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. The geographical separation between Tennant Creek and Darwin was like having people on the other side of the world. Her family in Tennant Creek meanwhile mourned her as if she was 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 I recount is only part of the life of Lorna Cubillo. She is indeed a remarkable woman. Her struggle to overcome



these events is worthy of far greater detail. Her despair, loneliness and distress were truly conveyed when she gave her evidence.

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.²

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.'³

In his judgment, the trial judge quoted from *North of 23 Degrees: Ramblings in Northern Australia*, a book written in 1946 by Bill Harney, a Northern Territory patrol officer. The book reinforces the distress of removals and describes the grief that Aboriginal people, and mothers in particular, suffered when children were taken from them. The trial judge noted that, in his evidence, the patrol officer who drove the truck away from Philip Creek did not disagree with the context of passages that I here repeat:

A station homestead or a native camp where, emits laughter, swimming or maybe out hunting with their fathers or mothers, these little half-castes would live among their own people, tended by all the tribe and particularly by a mother whoever

watches over her child and tends to its wants. Then one day that child will be taken away and great would be the wails which come from the camp. Blood would flow from the head of the mother as she gashed it with stick or stone in anguish for her lost child. Yet after a few days all is forgotten as most people forget. Nevertheless, that mother still yearns for her lost one and carries little bits of its clothes around in memory of her child.⁴

Do I have to go on? It is a nonsense to deny that the conduct did not occur. 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.

As to the assault committed on Lorna Cubillo, the judge had no doubt that the incident occurred. His description of Mr Walter, who committed the assault, gives some idea of life at the Retta Dixon Home where Lorna Cubillo was detained in Darwin.

I am satisfied that an incident such as that described by Mrs Cubillo occurred. Mr Walter did not impress me as he gave his evidence. He presented as a man with supposedly deeply rooted Christian convictions, but with a dogmatism that I found disturbing. I formed the impression that Mr Walter was a religious zealot who would have been offended by the thought of young girls engaging in playful activities on the Sabbath.⁵

Peter Gunner was brought up at Utopia Station in a very traditional Aboriginal culture. By 1950, Utopia Station had little contact with Europeans. The evidence from witnesses for the Commonwealth, as well as those for Peter Gunner, described him as 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 patrol officer 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 — children being hidden by mothers, having their skin covered with charcoal in an effort to disguise them.

On 14 September 1955, the same patrol officer wrote:

The two children, Florry 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 patrol officer 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 his 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 is 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 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 be a consent. A consent by a mother who could write no English and, on any view of the evidence, could speak little. This was a consent by a mother who had never travelled beyond the lands of her clan.

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'.

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'.⁹ 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 to his family during school holidays, the shocking conditions of the hostel as depicted in the reports from 'welfare officers', the quality of its staff and the conduct of Mr Constable 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.¹⁰

I remind you that throughout his 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. The trial judge found that Mr Constable partook in perverted behaviour amounting to sexual misconduct.¹¹

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.

The impact of removal

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 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.¹²

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 and her pain nor do they reduce the extent of her damages. Those injuries and losses that she has suffered and will continue to suffer flow back to her removal and detention ... I believe this observation applies with equal force to Mr Gunner.¹³

Lorna Cubillo and Peter Gunner were taken from families that loved and cared for them. The family kin system, I should emphasise, is an extended system where uncles are also fathers and aunts also mothers.

The policy of Indigenous child removal

Why were these children removed from their families? Because of policy. The policy of child removal in the Northern Territory. The policy is best reflected in the legislation — the *Aboriginal Ordinances*.¹⁴ 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.
- Aboriginal people could not travel from one part of the Northern Territory to another without permission.
- Aboriginal people could not marry without permission.

- Aboriginal people could not travel from one reserve to another without permission.
- 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. Children could be legally wrenched from families. Aboriginal people were treated as less than human.

This is not the Stolen Generation — these are the Stolen Generations. The impact of these policies is felt generation after generation by Aboriginal children. 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 Aborigines in 1912 stated:

No half-caste children should be allowed to remain in any native camp, 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.¹⁵

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 can be readily stated, and further that the administration of such a policy can be shown to be just and considerate.¹⁶

In 1951, the policy was noted as follows:

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.¹⁷

The trial judge made the following finding in relation to policy:

Despite the submissions by the Commonwealth to the contrary, I cannot accept that the policy as finally approved by Sir Paul Hasluck meant that a part Aboriginal child could only be removed if his or her mother consented.¹⁸

The critical factor in the loss of each applicant's claim was the statute of limitations. Although each applicant was found to have met the threshold test for the exercise of discretion to extend time, that discretion was not exercised in their favour. The reason given by the trial judge: the effluxion of time had so prejudiced the defence of the Commonwealth that it could not obtain a fair trial. This finding was made, despite the positive findings of fact concerning much of each applicant's claim. Whilst there were other legal issues, the fundamental basis for the defeat of the applicants' claims was the statute of limitations. If these types of claims are to succeed in the courtroom,

legislative changes to the Northern Territory *Limitation Act* are required.

Righting the wrong

Estimates of the costs of the *Cubillo and Gunner* litigation vary. It is clear from parliamentary questions that the Commonwealth spent massively. Estimates of total costs range from \$15 million to \$20 million. I am confident that if this sort of money had been devoted to a Reparations Tribunal in 1998 that the process of healing, together with the issue of compensation, would have been enormously advanced. True it is that the millions of dollars brought the government a technical and artificial legal victory, but this court win does not change or reduce the pain, nor the gravity of the Commonwealth's conduct disclosed in the courtroom and in the *Bringing Them Home* report.¹⁹

In May 2002, the Queensland Government indicated it would make provision of \$55.6 million for compensation of Aboriginal people who compulsorily and disgracefully had wages withheld by the Government decades ago. The Catholic Church in Victoria has established a commission to compensate those abused by clergy. Whilst the scheme is not without its faults, it at least provides a basis for people to be compensated, avoiding costly litigation and legal issues such as a limitations defence. Many of those claiming under the scheme were children when abused decades ago. Surely this nation has the capacity and the heart to act in a similar way to those who, by dint of government policy, were withdrawn from family and community.

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 this 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 government to our Indigenous people, particularly the issue of removal of children.

I remember the outrage in Australia at a report that history texts for Japanese schoolchildren had effectively re-written the history of the Second World War. References to the atrocities of Japanese forces had been totally omitted and a form of justification for the conduct of the Second World War 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 justification 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 government says it owes them no apology. It is a nonsense to say that this is 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.

Malcolm Fraser, in the Fifth Vincent Lingiari Memorial Lecture on 24 August 2000, stated:

While we reject the attitudes that led to these policies, we also need to have enough humility to recognise that our condemnation comes from a later stage in human development. It is a mark of how Australia has travelled. It is a mark also of how far much of the world has travelled. *All the more reason for today's Australians officially to express their sorrow for what has happened.*²⁰

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.

References

1. *Cubillo and Gunner v Commonwealth of Australia* [2000] FCA 1084 (hereafter *Cubillo and Gunner*); affirmed on appeal at *Cubillo and Gunner v Commonwealth of Australia* [2001] FCA 1213 (31 August 2001); application for special leave to appeal to the High Court denied on 3 May 2002.
2. *Cubillo and Gunner*, para 444.
3. *Cubillo and Gunner*, para 445.
4. *Cubillo and Gunner*, para 453.
5. *Cubillo and Gunner*, para 687.
6. *Cubillo and Gunner*, para 774.
7. *Cubillo and Gunner*, para 778.
8. *Cubillo and Gunner*, para 782.
9. *Cubillo and Gunner*, para 1056.
10. *Cubillo and Gunner*, para 1073.
11. *Cubillo and Gunner*, para 992.
12. *Cubillo and Gunner*, para 1506. See also *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 356-7 (Brennan J).
13. *Cubillo and Gunner*, para 1537.
14. See generally *Aboriginals Ordinance 1911* (NT); *Aboriginals Ordinance 1918* (NT); *Welfare Ordinance 1953* (NT).
15. *Cubillo and Gunner*, para 172.
16. *Cubillo and Gunner*, para 208.
17. *Cubillo and Gunner*, para 222.
18. *Cubillo and Gunner*, para 237.
19. Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, HREOC, Sydney, 1997.
20. Rt Hon Malcolm Fraser, 'The Past We Need to Understand', Fifth Vincent Lingiari Memorial Lecture, Northern Territory University, 24 August 2000 (emphasis added).