CASE COMMENT: *CUBILLO AND GUNNER V THE COMMONWEALTH* A Denial of the Stolen Generation?

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In the recent Australian decision in *Cubillo & Gunner v The Commonwealth* (*'Cubillo 3'*), the Full Court of the Federal Court dismissed an appeal by the Aboriginal claimants seeking damages for, *inter alia*, their removal from their families and detention at certain Aboriginal institutions. The removal and detention of the plaintiffs was held to be lawful in the earlier determination of O'Loughlin J because it was, *inter alia*, believed to be in the [then] child's best interests and, as the plaintiffs bore the onus of proof, they had failed to show that they were taken without the consent of their parents/guardians. This decision was based upon the factual finding that 'at the relevant times, there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of part-Aboriginal children, irrespective of the personal circumstances of each child'. The Full Court did not comment on O'Loughlin J's assertion that the policy of removing part-Aboriginal children, as asserted by the plaintiffs, could not be maintained. Moreover, the Full Court in fact joined O'Loughlin J in trying to distance their findings from the broader issue of the legal rights of members of the Stolen Generation, emphasising that they were only concerned with the particular circumstances of the two plaintiffs/appellants. This case comment is not aimed at evaluating the specific legal issues raised by the plaintiffs' claims in this case or reviewing the history of the Stolen Generation, but rather seeks to examine O'Loughlin J's comment as to the absence of a policy of indiscriminate removal and detention of part-Aboriginal children in a bid to determine the parameters intended by the court. It will be seen that, at its broadest, the statement is quite inflammatory and may be seen as a denial of the Stolen Generation. It will be submitted that this was not intended by the court. At its narrowest, the statement is merely an assertion that the particular plaintiffs failed to prove their cases. It will be submitted that, whilst this clearly was the view of the court, O'Loughlin J's statement does have broader implications which, it will be contended, are not warranted.

Introduction

In the recent Australian decision in *Cubillo & Gunner v The Commonwealth*[1] (*'Cubillo 3'*), the Full Court of the Federal Court dismissed an appeal by the

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Aboriginal claimants seeking damages for, *inter alia*, their removal from their families and detention at certain Aboriginal institutions. The appellants were appealing against the earlier decision of O'Loughlin J ('*Cubillo 2*'),[2] where the court rejected their claims of false imprisonment, breach of duty of care, breach of statutory duty and breach of fiduciary duty. While it will be seen that O'Loughlin J would not agree with this categorisation of the facts,[3] the broader factual basis of the plaintiffs' causes of action was their removal from their families and subsequent detention as part of the 'Stolen Generation'.[4] The term refers to those part-Aboriginal children who were removed from their families and placed in homes and institutions[5] as part of a governmental policy of assimilation.[6] In addition to such removal and detention, *inter alia*, one of the plaintiffs, Mrs Cubillo, had been severely physically assaulted by one of the male missionaries at the institution in which she was placed,[7] and the other plaintiff, Mr Gunner, and other children at the institution where he was placed, had been sexually assaulted by another male missionary.[8] O'Loughlin J held that the removal and detention of the plaintiffs was lawful because it was, *inter alia*, believed to be in the [then] child's best interests[9] and, as the plaintiffs bore the onus of proof,[10] they had failed to show that they were taken without the consent of their parents/guardians.[11]

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1 [2001] FCA 1213, Summary at 3.

2 *Cubillo & Gunner v The Commonwealth* [2000] FCA 1084.

3 It will be seen that O'Loughlin J was at pains to assert that the subject facts did not fall into the category of the Stolen Generation: *Cubillo 2* [2000] FCA 1084, paras 3 and 65. See also *Cubillo 3* [2001] FCA 1213 at 10.

4 Apparently Read (1982) coined this term.

5 Cf *Cubillo & Gunner v The Commonwealth* [1999] FCA 518, para 2 ('*Cubillo 1*'); *Cubillo 2* [2000] FCA 1084, para 1.

6 Ultimately, O'Loughlin J accepted this was one of the aims of the policy: *Cubillo 2* [2000] FCA 1084, esp para 1146. See also *Cubillo 2* [2000] FCA 1084, paras 158, 160, 162, 226, 233, 235, 251 and 257; *Williams v The Minister No 2* [1999] NSWSC 843, para 88. Note the distinction between: (i) the policy of assimilation by removal of part-Aboriginal children; and (ii) the more general policy of gradual assimilation that extended to all Aboriginal persons, not just part-Aboriginal persons, that was implemented by Sir Paul Hasluck, then Federal Minister of State for the Territories: *Cubillo 2* [2000] FCA 1084, esp paras 273–75. The plaintiffs asserted they had been 'victims' of the former policy.

7 *Cubillo 2* [2000] FCA 1084, paras 11, 30, 677, 678, 682, 705 and 729.

8 *Cubillo 2* [2000] FCA 1084, paras 14 and 348, 899–905, 907–908, 946, 955, 960, 965, 974, 985, 989–90 and 992–94.

9 *Cubillo 2* [2000] FCA 1084, paras 1146 and 1305.

10 *Cubillo 2* [2000] FCA 1084, paras 1538–39.

11 See, for example, *Cubillo 2* [2000] FCA 1084, paras 503, 511, 1167, 1264 and 1538–39.

This is a very sad case. No one who has read the judgments can help but be moved by the disturbing evidence given in the course of the trial.[12] In this regard, O'Loughlin J also showed sympathy to the plight of the plaintiffs and, on key points, found they and their supporting witnesses to be truthful witnesses.[13] However, he was also sympathetic to those who were involved in the plaintiffs' removal and detention[14] and, it will be seen, was most concerned that their actions and the underlying governmental policy not be evaluated 'by reference to contemporary standards, attitudes, opinions and beliefs'.[15] Moreover, in a complex and sometimes inconsistent judgment,[16] O'Loughlin J held against the plaintiffs on the basis of factual findings that at times appear harsh and rather insensitive to the plight of the plaintiffs[17] and at other times for reasons of law which, it has been submitted, were ill-founded.[18] These

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12 For example, in regard to the evidence regarding the actual removal of Mrs Cubillo and Mr Gunner from their respective families and the assaults upon them whilst in care.

13 O'Loughlin J thought, though, that they may have at times engaged in reconstruction based upon what they thought must have happened. See, for example, *Cubillo 2* [2000] FCA 1084, paras 125 and 1482. See also *Cubillo 3* [2001] FCA 1213 para 165.

14 See for example, *Cubillo 2* [2000] FCA 1084, para 28.

15 [2000] FCA 1084, para 84. See also *Cubillo 2* [2000] FCA 1084, paras 85, 102 and 109.

16 See, for example, the discussion below regarding O'Loughlin J's findings as to whether parental consent was given in regard to the removal of Mrs Cubillo from Phillip Creek.

17 For example, the findings that the injuries the plaintiffs suffered stemmed from their non-actionable removal and detention, not from being physically/sexually assaulted whilst detained (*Cubillo 2* [2000] FCA 1084, paras 1247, 1536 and 1563) and the plaintiffs' failure to mitigate their losses by seeking medical assistance and/or taking steps to regain their Aboriginality (*Cubillo 2* [2000] FCA 1084, paras 656, 1540 and 1541).

18 For example, the court held that the plaintiffs could not claim a breach of fiduciary duties in addition to their tortious claims for false imprisonment and breach of duty of care (*Cubillo 2* [2000] FCA 1084, para 1299, following *Paramasivam v Flynn* (1998) 160 ALR 203 at 218-220; *Williams v Minister, Aboriginal Land Rights Act 1983 & Anor [No 2]* [1999] NSWSC 843; *Lovejoy v Carp & Ors* [1999] VSC 223 (delivered 18 June 1999); *Prince v Attorney-General* [1996] 3 NZLR 733) and equitable damages could not be sought as the plaintiffs had suffered no economic loss, only physical and psychological damage: *Cubillo 2* [2000] FCA 1084, para 1307. See further Cassidy, 'The Stolen Generation: A breach of fiduciary duties?' (prepared for the Law and Public Policy seminar presented by the author at Osgoode Hall Law School, York University, Toronto, 21 November 2002). In any case, O'Loughlin J held that their claims were barred under the statute of limitations (*Cubillo 2* [2000] FCA 1084, paras 1168, 1420, 1423 and 1425) and doctrine of laches as the Commonwealth had been grossly prejudiced in the delay in bringing the subject claims: *Cubillo 2* [2000] FCA 1084, paras 1433-1434. See further Clarke 'Case Note: Cubillo v Commonwealth' (2001) 25 Melb Uni LR 218.

findings included a statement that 'at the relevant times, there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of part-Aboriginal children, irrespective of the personal circumstances of each child'.[19]

In essence, on appeal the Full Court accepted O'Loughlin J's findings of fact and asserted that he had not erred in law.[20] In addition, a number of the appellants' submissions on appeal were rejected as new claims that had not previously been pleaded or argued at trial.[21] The Full Court did not, however, comment on O'Loughlin J's assertion that the policy of removing part-Aboriginal children, as asserted by the plaintiffs, could not be maintained.[22] Moreover, the Full Court in fact joined O'Loughlin J in trying to distance its findings from the broader issue of the legal rights of members of the Stolen Generation, emphasising that it was only concerned with the particular circumstances of the two plaintiffs/appellants.[23]

The significance of the case, however, was not lost on O'Loughlin J. In *Cubillo & Gunner v The Commonwealth* ('*Cubillo 1*'),[24] O'Loughlin J commented that 'these cases are of such importance — not only to the individual applicants and to the larger Aboriginal community, but also to the Nation as a whole'.[25] It is submitted these sentiments more accurately reflect the scope and importance of this case. Thus, despite the Full Court's attempt to confine the impact of the case, the reality is that the decision deals an incredible blow to all members of the Stolen Generation. All such persons

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19 *Cubillo 2* [2000] FCA 1084, paras 300 and 1160. See also *Cubillo 3* [2001] FCA 1213, Summary at 2.

20 *Cubillo 3* [2001] FCA 1213, paras 249, 250, 252, 256, 287, 294, 299–303, 323, 324, 327–36, 378, 399, 436, 445, 465–66 and 471.

21 The new claims were: (i) breach of duty in the manner of removal ([2001] FCA 1213, paras 351 and 363–68); (ii) failure to ensure the children maintained contact with their families ([2001] FCA 1213, paras 370 and 374); (iii) failure to protect them from physical and sexual assault ([2001] FCA 1213, paras 379 and 383); (iv) the unsuitability of St Mary's Hostel ([2001] FCA 1213, paras 387 and 388); and (v) the failure to inform Mr Gunner's mother as to the conditions at St Mary's ([2001] FCA 1213, paras 391 and 392). The Full Court held that these new claims could not be brought on appeal as there was insufficient findings of fact made by O'Loughlin J for them to be determined and the Commonwealth would be prejudiced as it had not had the opportunity to present evidence in defence of such claims: *Cubillo 3* [2001] FCA 1213, paras 368, 369, 374, 376, 378, 383–85, 388–90, 394, 396, 397, 398, 442 and 443.

22 *Cubillo 3* [2001] FCA 1213, para 10.

23 *Cubillo 2* [2000] FCA 1084, para 3 and *Cubillo 3* [2001] FCA 1213, para 10.

24 [1999] FCA 518. This involved a preliminary application by the Commonwealth for summary dismissal of the plaintiffs' case on the basis that the plaintiffs had no causes of action against the Commonwealth and that their actions were statute barred and barred under the equitable doctrine of laches. Subject to certain comments on deficiencies in the plaintiff's pleadings, O'Loughlin J rejected the Commonwealth application.

25 *Cubillo 1* [1999] FCA 518, Summary at 3.

effectively cannot bring any action against the Commonwealth. In the absence of the High Court overruling the determination, including the finding that the Commonwealth government did not have a policy of removing part-Aboriginal children from their families,[26] subsequent claims will effectively be barred.[27]

This case comment is not aimed at evaluating the specific legal issues raised by the plaintiffs' claims in this case.[28] Rather, it is believed that it would be remiss not to provide some comment on the potentially broader aspect of the *Cubillo case* — namely, the court's finding as to the alleged governmental policy of removing part-Aboriginal children from their families.[29] This case comment does not review the history of the Stolen Generation, but rather seeks to examine O'Loughlin J's comment in a bid to determine the parameters intended by the court. It will be seen that, at its broadest, the statement is quite inflammatory and may be seen as a denial of the Stolen Generation.[30] It will be submitted that this was not intended by the court. At its narrowest, the statement is merely an assertion that the particular plaintiffs failed to prove their cases. It will be submitted that, whilst this clearly was the view of the court, O'Loughlin J's statement does have broader implications which, it will be contended, are not warranted.

Before O'Loughlin J's statement in *Cubillo 2* is evaluated in this manner, a brief outline of the relevant facts is provided. It will be seen that this is necessary to fully appreciate the breadth O'Loughlin J intended for the subject statement.

Facts[31]

O'Loughlin J's judgment in *Cubillo 1*[32] is over 200 pages long and the *Cubillo 2*[33] judgment runs to 674 pages, with more than half of these pages involving detailed findings of fact. The *Cubillo 3*[34] judgment is also over 100 pages long. It is therefore impossible to provide anything more than a summary of some of

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26 *Cubillo 2* [2000] FCA 1084, paras 300 and 1160. See further *Cubillo 3* [2001] FCA 1213, Summary at 2.

27 In particular, note again that, in any case, O'Loughlin J held that their claims were barred under the statute of limitations (*Cubillo 2* [2000] FCA 1084, paras 1168, 1420, 1423 and 1425) and the doctrine of laches as the Commonwealth had been grossly prejudiced in the delay in bringing the subject claims: *Cubillo 2* [2000] FCA 1084, paras 1433–34.

28 In regard to the claims for breach of fiduciary duty, see Cassidy (2003). See generally Clarke (2001).

29 *Cubillo 2* [2000] FCA 1084, para 300. See also *Cubillo 3* [2001] FCA 1213, Summary at 2.

30 See, for example, Bolt (2001), p 19.

31 This statement of facts is extracted, and summarised, from Cassidy (2003). For a fuller discussion of the facts, see Clarke (2001).

32 [1999] FCA 518.

33 [2000] FCA 1084.

34 [2001] FCA 1213.

the key findings of fact, and thus the truly sad picture underlying this case may not be entirely or appropriately painted.

Mrs Cubillo was born on a pastoral property, Banka Banka Station, north of Tennant Creek in the Northern Territory of Australia, on or about 8 August 1938. Her mother, Maude Nambijimpa (or Nampijinpa), was a woman of Aboriginal descent and her father, Horace George Nelson, was a white soldier.[35] Mrs Cubillo's mother died when Mrs Cubillo was a very young child. She was largely cared for, and lived with, her mother's sister, Maisie, who she believed until her teenage years to be her natural mother.[36] Mrs Cubillo stated that two patrol officers forcibly took her from Banka Banka Station in about 1945.[37] She was taken to ration depots at, firstly, Seven Mile Creek, then Six Mile Creek,[38] and later Phillip Creek.[39] It is unclear, but it appeared that at Phillip Creek Mrs Cubillo was cared for by her Aunt Maisie.[40] The Aborigines Inland Mission of Australia ('AIMA'), a Protestant interdenominational faith mission, administered these depots.[41] However, the Native Affairs Branch, a governmental department of the Northern Territory Administration, had a deep financial involvement and regarded the Phillip Creek Native Settlement as a 'departmental settlement'.[42]

In 1947, when Mrs Cubillo was aged eight, she and 15 or 16 other children 'were loaded on to a truck and taken from Phillip Creek to the Retta Dixon Home',[43] located on an Aboriginal reserve in Darwin. Mrs Cubillo said that the removal of the children caused great distress to those who were taken, as well as to those who were left behind:[44]

> As the truck left Philip Creek everyone was crying and screaming. I remember mothers beating their heads with sticks and rocks. They were bleeding. They threw dirt over themselves. We were all crying on the truck. I remember that day. Mothers chased the truck from Philip Creek screaming and crying. They disappeared in the dust of the truck.

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35 *Cubillo 1* [1999] FCA 518, para 22.

36 *Cubillo 1* [1999] FCA 518, para 23.

37 *Cubillo 1* [1999] FCA 518, para 24; *Cubillo 2* [2000] FCA 1084, para 7.

38 *Cubillo 1* [1999] FCA 518, para 24. *Cubillo 2* [2000] FCA 1084, para 8. At Seven Mile Creek and Six Mile Creek, it appears Mrs Cubillo was cared for by her grandmother: *Cubillo 2* [2000] FCA 1084, para 409. Her Aunt Maisie visited her from time to time, but she did not stay because she worked at Banka Banka: *Cubillo 2* [2000] FCA 1084, para 409.

39 *Cubillo 1* [1999] FCA 518, para 24; *Cubillo 2* [2000] FCA 1084, para 9.

40 *Cubillo 2* [2000] FCA 1084, para 421.

41 *Cubillo 2* [2000] FCA 1084, para 8.

42 *Cubillo 2* [2000] FCA 1084, paras 413 and 501.

43 *Cubillo 1* [1999] FCA 518, para 25. See also *Cubillo 2* [2000] FCA 1084, paras 1 and 10.

44 *Cubillo 1* [1999] FCA 518, para 25.

O'Loughlin J accepted Mrs Cubillo's evidence that her removal from the Phillip Creek Native Settlement was a 'sad and traumatic event' from which she continued to suffer.[45] He said that he took this view regardless of whether her removal was with the informed consent of those who cared for her.[46] It will be seen that a confusing aspect of O'Loughlin J's findings pertains to whether the removal from Phillip Creek was with the consent of the children's parents/guardians. Ultimately, and somewhat inconsistently, O'Loughlin J concluded that on the evidence he was unable to conclude one way or the other regarding the issue of parental/carer consent.[47] As discussed below in more detail, as Mrs Cubillo bore the burden of proof,[48] O'Loughlin J held she had 'failed to establish that she was, at that time, in the care of an adult Aboriginal person (such as Maisie) whose consent to her removal was not obtained'.[49]

Miss Shankelton, who was superintendent at the Retta Dixon Home, had been in charge of the children's removal.[50] However, Mr Les Penhall, a patrol officer and employee of the Native Affairs Branch of the Northern Territory Administration, drove the truck.[51] The Retta Dixon Home was established in 1946 by AIMA.[52] The Northern Territory Administration provided the buildings and furnishings for the home,[53] as well as annual funding.[54] In time, it was recognised by the Northern Territory Administrator as an official 'Aboriginal Institution'.[55]

In 1953, a committal order was made by the Director of Native Affairs under section 16 of the *Aboriginals Ordinance 1918* (NT), committing Mrs Cubillo to the custody of the Retta Dixon Home until she was 18 years old.[56] In accordance with this order, Mrs Cubillo was an inmate at the Retta Dixon Home until 1956 when she attained the age of 18.[57] During her time as an inmate, her Aunt Maisie never visited Mrs Cubillo.[58] The only time she saw her was during a visit in school holidays when Mrs Cubillo was 17.[59] By that

45 *Cubillo 1* [1999] FCA 518, para 445.

46 *Cubillo 1* [1999] FCA 518, para 445.

47 *Cubillo 2* [2000] FCA 1084, para 440.

48 *Cubillo 2* [2000] FCA 1084, paras 1538–39.

49 *Cubillo 2* [2000] FCA 1084, para 511.

50 *Cubillo 1* [1999] FCA 518, para 24; *Cubillo 2* [2000] FCA 1084, para 10.

51 *Cubillo 1* [1999] FCA 518, para 24; *Cubillo 2* [2000] FCA 1084, para 10. Mr Penhall was found to be an employee of the Commonwealth: *Cubillo 2* [2000] FCA 1084, para 1086. The Director of Native Affairs at that time was Mr Frank Moy: *Cubillo 2* [2000] FCA 1084, Summary, para 6.

52 *Cubillo 1* [1999] FCA 518, para 26; *Cubillo 2* [2000] FCA 1084, para 10.

53 *Cubillo 2* [2000] FCA 1084, para 525.

54 *Cubillo 2* [2000] FCA 1084, para 525.

55 *Cubillo 2* [2000] FCA 1084, para 514.

56 *Cubillo 2* [2000] FCA 1084, para 1156.

57 *Cubillo 1* [1999] FCA 518, para 25; *Cubillo 2* [2000] FCA 1084, para 10.

58 *Cubillo 2* [2000] FCA 1084, para 637.

59 *Cubillo 2* [2000] FCA 1084, para 638.

time, it was difficult for her to communicate with Maisie because of Maisie's limited English.[60]

Mrs Cubillo gave evidence as to the harsh treatment she suffered at the hands of Miss Shankelton and her co-missionaries.[61] The court accepted that one of the male missionaries, Mr Des Walter, had acted improperly by placing his hand on the upper part of her leg when they were alone in a car, causing her to cry,[62] and that on another occasion he viciously beat her with the buckle of his trouser belt.[63] In consequence of this beating, Mrs Cubillo sustained lacerations to her hands, face and one breast, with one nipple partially severed.[64]

Mr Gunner was born in 1948 at Utopia Station, a pastoral property in the Northern Territory, about 250 kilometres northeast of Alice Springs. Mr Gunner's mother, Topsy Angala (Topsy Kundrilba),[65] was a woman of Aboriginal descent and his father was a 'European' whose name was also Peter Gunner.[66]

In May 1956, on the recommendation of Mr Kitching, a patrol officer in the employ of the Native Affairs Branch of the Northern Territory Administration, Mr Gunner, then aged seven, was taken from the station and was ultimately admitted to St Mary's hostel, near Alice Springs. As with Mrs Cubillo's removal, Mr Gunner's recollection of his removal was distressing. Mr Gunner said that there had been two earlier attempts to remove him,[67] but he had managed to run away and his family hid him from the patrol officers.[68] Mr Gunner said that, on the day when he was ultimately taken, 'a white fella' dressed in a khaki uniform 'just grabbed me and put me back the truck [sic]'.[69] Mr Gunner said that he was 'crying and screaming' and a lot of the families were 'crying and yelling in Aboriginal language'.[70] He said that his mother was among those who were present at the time he was put on the truck.

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60 *Cubillo 2* [2000] FCA 1084, para 638.

61 *Cubillo 2* [2000] FCA 1084, para 10.

62 *Cubillo 2* [2000] FCA 1084, paras 677, 687 and 729.

63 *Cubillo 2* [2000] FCA 1084, paras 11, 30, 677, 678, 682, 705 and 729.

64 *Cubillo 2* [2000] FCA 1084, para 678.

65 Note that, whilst Topsy rejected her son at birth and for some time thereafter, that position changed and the court accepted that Mr Gunner enjoyed the conventional love and affection that a child has from his mother: *Cubillo 2* [2000] FCA 1084, paras 832 and 1478.

66 *Cubillo 2* [2000] FCA 1084, paras 832 and 1478.

67 See further *Cubillo 2* [2000] FCA 1084, paras 816, 819, 822 and 833.

68 *Cubillo 2* [2000] FCA 1084, para 819. One witness gave evidence of how Mr Gunner's family would hide him from the white man: 'they would take him out into the bush and rub charcoal on him': *Cubillo 2* [2000] FCA 1084, para 833.

69 *Cubillo 2* [2000] FCA 1084, para 816.

70 *Cubillo 2* [2000] FCA 1084, para 816.

Again it will be seen that it was in issue whether Mr Gunner was taken with his mother's free consent. O'Loughlin J ultimately accepted that Mr Gunner's mother had in fact consented to his removal.[71]

The Church of England's Australian Board of Missions ran the St Mary's hostel,[72] but again it was an official Aboriginal Institution.[73] The superintendent of the hostel in 1956 was Captain Steep.[74] The hostel was substantially subsidised by the Commonwealth[75] and, while not extending to the employment of staff, the Director of Native Affairs and Welfare had extensive supervisory and regulatory powers over the hostel.[76] In 1956, a committal order was made by the Director of Native Affairs under section 16 of the *Aboriginals Ordinance 1918* (NT), committing Mr Gunner to the custody of St Mary's until his eighteenth birthday in 1966.[77] A further committal order in the same terms was made in February 1957[78] and in May 1957 the Administrator declared Mr Gunner to be a ward pursuant to section 14 of the *Welfare Ordinance 1953* (NT).[79]

By the end of 1956, *inter alia*, the Director of Welfare and the Administrator were expressing grave concerns about the staff and management at St Mary's.[80] The hostel was inadequately staffed and the facilities were inadequate and unhygienic.[81] In this regard, it should be noted that Mr Gunner also alleged that he was ill-treated whilst he was at St Mary's.[82] In particular, Mr Gunner and four other witnesses gave evidence that they had been sexually assaulted by one of the missionaries, Mr Kevin Constable, and that he had suffered cruel beatings.[83] The court accepted that Mr Constable had engaged in sexual misconduct in regard to Mr Gunner.[84]

Mr Gunner remained at the hostel until February 1963.[85] At this point, when he was about 14, 'he was taken from St Mary's to Angas Downs ... a cattle station, about 250 kilometres to the south of Alice Springs'.[86] Mr Gunner stayed at Angas Downs doing stock work until 1965 when the owner, Mr

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71 *Cubillo 2* [2000] FCA 1084, paras 787, 788, 790, 838 and 1133.

72 *Cubillo 1* [1999] FCA 518, paras 27 and 28; *Cubillo 2* [2000] FCA 1084, para 12.

73 *Cubillo 2* [2000] FCA 1084, paras 744 and 1156.

74 *Cubillo 2* [2000] FCA 1084, para 841.

75 *Cubillo 2* [2000] FCA 1084, para 753.

76 *Cubillo 2* [2000] FCA 1084, paras 344 and 1141.

77 *Cubillo 2* [2000] FCA 1084, para 789.

78 *Cubillo 2* [2000] FCA 1084, para 839.

79 *Cubillo 2* [2000] FCA 1084, para 155.

80 *Cubillo 2* [2000] FCA 1084, para 1034.

81 *Cubillo 2* [2000] FCA 1084, paras 60, 1028, 1050, 1063, 1066 and 1073.

82 *Cubillo 1* [1999] FCA 518, para 30; *Cubillo 2* [2000] FCA 1084, para 14.

83 *Cubillo 2* [2000] FCA 1084, paras 14 and 348, 899–905, 907–8, 946, 955, 960, 965, 974, 985, 989–90 and 992–94.

84 *Cubillo 2* [2000] FCA 1084, paras 993–94.

85 *Cubillo 1* [1999] FCA 518, para 27.

86 *Cubillo 1* [1999] FCA 518, para 32; *Cubillo 2* [2000] FCA 1084, paras 909–13.

Liddle, told him that he could leave. Mr Gunner said that 'he was taken by Mr Liddle to Alice Springs and left there to fend for himself'.[87] O'Loughlin J held that 'there was nothing in the evidence to suggest that the Director was "detaining" Mr Gunner whilst he was at Angas Downs'.[88]

Stolen Generation

As noted above, this case comment is not primarily concerned with the history of the Stolen Generation, but it is important to consider more closely O'Loughlin J's finding as to the alleged Commonwealth government policy of forcibly removing part-Aboriginal children from their families. This is important because, depending on the breadth of his finding, it may impact heavily on the success of future claims. This is also pertinent given that the Full Federal Court did not comment on the accuracy of O'Loughlin J's conclusion in this regard. The Full Court asserted that it was unnecessary in light of the issues on appeal.[89] The Full Court in fact added a cautionary note that nothing it said 'should be read as indicating any view which we may have about those findings'.[90]

As noted above, O'Loughlin J held that 'at the relevant times, there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of part-Aboriginal children, irrespective of the personal circumstances of each child'.[91] This statement can be broadly or narrowly construed, with a consequent broadening or narrowing of its jurisprudential impact. To this end, in evaluating this statement there are five steps that need to be considered. First, at its broadest level, the statement implies a denial of the Stolen Generation. Second, it may be construed as merely denying that such a policy existed in the Northern Territory. Third, when narrowly construed, it merely denies the 'indiscriminate' removal and detention of part-Aboriginal children. Fourth, and related to the last point, when narrowly construed it merely denies that 'all' part-Aboriginal children were subject to a policy of indiscriminate removal and detention. Finally, the statement may merely amount to an assertion that in this particular case the plaintiffs had failed to prove that they were the 'victims' of such a policy. Each of these matters is considered in turn.

First, the Commonwealth government's policy of removing part-Aboriginal children from their families and placing them in homes and institutions is well documented.[92] This was part of the government's policy of

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87 *Cubillo 1* [1999] FCA 518, para 32.

88 *Cubillo 2* [2000] FCA 1084, para 1150.

89 *Cubillo 3* [2001] FCA 1213, para 10.

90 *Cubillo 3* [2001] FCA 1213, para 10.

91 See also *Cubillo 2* [2000] FCA 1084, paras 300 and 1160 and *Cubillo 3* [2001] FCA 1213, Summary at 2.

92 Most notably, the Human Rights and Equal Opportunity Commission (1997) report, *Bringing Them Home*. See also Senate Legal and Constitutional References Committee (2000); Read (1982); Clarke (2001); Manne (2001); Haebich (2001); Kidd (2000).

assimilation.[93] The underlying idea of this government policy was to remove part-Aboriginal children from their families so that they could be integrated into white society.[94] Whilst the government's practice of removing such children has been well documented for many decades, a public outcry ensued in Australia in response to more recent revelations of the practice. Most notably, the Australian Human Rights and Equal Opportunity Commission Report *Bringing Them Home,* tabled in the Commonwealth Parliament on 25 May 1997, led to public calls for a government apology.[95] In *Kruger v Commonwealth,*[96] while the High Court upheld the validity of the legislation that facilitated the institutionalisation of part-Aboriginal children, Brennan CJ noted that the revelations 'of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation'.[97] The Family Court has also recognised the 'devastating long term

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93 Ultimately, O'Loughlin J accepted that this was one of the aims of the policy: *Cubillo 2* [2000] FCA 1084, esp para 1146. See also *Cubillo 2* [2000] FCA 1084, paras 158, 160, 162, 226, 233, 235, 251 and 257; *Williams v The Minister No 2* [1999] NSWSC 843 para 88. Note again the distinction between (i) the policy of assimilation by removal of part-Aboriginal children and (ii) the more general gradual policy of assimilation that extended to all Aboriginal persons, not just part-Aboriginal persons, that was implemented by Sir Paul Hasluck, then Minister of State for the Territories: *Cubillo 2* [2000] FCA 1084, esp paras 273–75. The plaintiffs asserted they had been 'victims' of the former policy.

94 It was resolved at the first Conference of Commonwealth and State Aboriginal Authorities (21–23 April 1937) that 'this conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth and it therefore recommends that all efforts be directed to that end'. Cf the report of the Administrator dated 28 February 1952 to the Secretary, Department of Territories in Canberra, quoted by O'Loughlin J in *Cubillo 2* [2000] FCA 1084, para 226.

95 For example, in response the Queensland Parliament passed a resolution of regret and apology for 'past policies under which indigenous children were forcibly separated from their families': Qld, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, pp 1947–82. The South Australian Parliament also passed a resolution of sincere regret and apology, for 'the forced separation of some Aboriginal children from their families and homes': SA, *Parliamentary Debates*, House of Assembly, 28 May 1997, pp 1435–43. The Victorian Parliament apologised 'for the past policies under which Aboriginal children were removed from their families and express[ed] deep regret at the hurt and distress this has caused and reaffirm[ed] its support for reconciliation between all Australians': Victoria, Parliamentary Debates, Legislative Assembly, 17 September 1997, p 10. The Assembly of the Australian Capital Territory passed a resolution of apology saying that it regarded 'the past practices of forced separation as abhorrent': ACT, *Parliamentary Debates*, Legislative Assembly, 17 June 1997, p 1604. The Commonwealth Parliament passed a motion of sincere regret (as opposed to an apology) on 26 August 1999. Note, O'Loughlin J was aware of these statements but considered it inappropriate to use them in the subject litigation. See *Cubillo 2* [2000] FCA 1084, paras 74–78.

96 (1997) 190 CLR 1.

97 (1997) 190 CLR 1 at 36.

effect on thousands of Aboriginal children arising from their removal from their Aboriginal famil[ies] and their subsequent upbringing within a white environment'. [98]

Thus O'Loughlin J's statement should not be given its broadest interpretation. Nor was this intended by the court. In this regard, it should be noted that, in *Cubillo 2,*[99] O'Loughlin J declares that 'the evidence in this trial, nor these reasons for judgment, deny the existence of "the Stolen Generation". Writings, both contemporary and historical (not all of which were presented as evidence in this trial), tell tragically of a distressing past.' Thus, in both *Cubillo 1*[100] and *Cubillo 2,*[101] O'Loughlin J accepts that the plight of the Stolen Generation has been so documented.[102] In *Cubillo 2,* in a moving passage, he also discusses the grief that must have ensued from such separations.[103] Similarly, in *Cubillo 1* he states that 'it is important to recognise that the subject removal and detention of part-Aboriginal children has created racial, social and political problems of great complexity ...'.[104] He continues, however: [105]

> it nevertheless remains the duty of the Court, in the determination of the issues that are presently before the Court, to limit its observations to the legal issues that have been identified during the course of argument. Historians may wish to adjudicate on the social policies of former Governments and it must be left to the political leaders of the day to determine what, if any, action might be taken to arrive at a social or political solution to these problems. It would not be proper for this Court to go beyond the boundary of the legal issues that are to be determined.

Similarly, in *Cubillo 2*[106] he reiterates that '[m]any would take it for granted that "the Stolen Generation" is a catch phrase that truly describes what happened to many part-Aboriginal children for many years. But this trial has focused primarily on the personal histories of two people: Lorna Cubillo and Peter Gunner.' Thus he warned that the evidence before the Court could not be generalised, but rather 'the personal circumstances of Mrs Cubillo and, separately, ... the personal circumstances of Mr Gunner' must be examined.[107]

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98 *In the Marriage of B and R* (1994–1995) 19 Fam LR 594 at 602.

99 [2000] FCA 1084, paras 3 and 65.

100 [1999] FCA 518, paras 4 and 5.

101 [2000] FCA 1084, paras 3 and 65.

102 [1999] FCA 518, paras 4 and 5.

103 [2000] FCA 1084, para 64.

104 [1999] FCA 518, para 5.

105 [1999] FCA 518, para 5.

106 [2000] FCA 1084, paras 3 and 65.

107 [2000] FCA 1084, para 109.

By referring to the 'personal histories of two people'[108] O'Loughlin J was, in essence, able to say he was not considering the legal issues pertaining to the Stolen Generation. This was because he denied that the two plaintiffs were members of the Stolen Generation. He made this assertion on the basis of his conclusion that Mrs Cubillo had failed to prove the circumstances of her removal and that she had therefore failed to prove she had been removed without the consent of her guardian.[109] In respect to Mr Gunner, he concluded that he had been removed with his mother's consent.[110] He states that the terms of reference for the Commission's Report *Bringing Them Home* had not extended to separations that were effected with the consent of the child's family or cases of neglect where a child might have been removed without the consent of the child's parents or guardian.[111] Thus he concluded that the plaintiffs' cases did not fall within the parameters of the Stolen Generation as considered by the Commission.

This statement as to the Commission's terms of reference is not, however, technically correct. The terms of the Commission's reference extended to children removed not only by compulsion, but also by 'duress or undue influence'.[112] In this regard, it should be recalled that, while the court ultimately held that the circumstances of Mrs Cubillo's removal were unclear,[113] her evidence was that she was taken without her family's consent.[114] The Commonwealth did not establish contrary evidence that her guardian had consented. The court noted it was curious that 'neither the applicants nor the respondent could produce a single document in respect of that removal'.[115] Moreover, O'Loughlin J himself admitted that logic suggested that the Aboriginal parents could not have given their fully informed consent to the removal. Thus, initially, O'Loughlin J rejected the Commonwealth's submission that some or all of the parents — many of whom did not speak English — initiated the children's removal by asking the AIMA or the Native Affairs Branch to assist them in getting a better education for their children.[116] This is supported by the fact that Miss Shankelton would have had very little time 'to explain to the families of 16 or 17 children what was happening and to obtain their informed consent to the proposed removal'.[117] Hence O'Loughlin J initially concluded that Mrs Cubillo must have been taken without the consent of her guardian because Miss Shankelton could not have obtained the 'consent of the families of 16 or 17 children in a

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108 [2000] FCA 1084, paras 3 and 69. See also para 80.

109 *Cubillo 2* [2000] FCA 1084, paras 503, 511, 1167, 1264 and 1538–39.

110 *Cubillo 2* [2000] FCA 1084, paras 787, 790, 838, 1133 and 1167.

111 [2000] FCA 1084, para 65.

112 Terms of reference (a).

113 Summarised in *Cubillo 3* [2001] FCA 1213, Summary at 2.

114 *Cubillo 2* [2000] FCA 1084, para 1.

115 *Cubillo 2* [2000] FCA 1084, para 56.

116 *Cubillo 2* [2000] FCA 1084, para 503.

117 *Cubillo 2* [2000] FCA 1084, para 440.

period of no more than 24 hours'.[118] O'Loughlin J also accepted Mrs Cubillo's evidence that there was a 'tussle' between Miss Shankelton and one of Mrs Cubillo's aunts who was resisting handing over a baby.[119] An article authored by Miss Shankelton asserted that she had talked to the mothers prior to the transfer.[120] Even if this was accepted, the content of those discussions — and thus any pressure brought to bear on the mothers — is not detailed in the article. Thus it is submitted that the events that occurred in 1947 when Mrs Cubillo was removed from her family would have fallen within the parameters of the Commission's terms of reference.

Mr Gunner had also asserted he was taken without his family's consent.[121] This was supported by one of the witnesses, Mr Skinner, who was living at Utopia when Mr Gunner was taken to St Mary's. Mr Skinner said that Mr Gunner was forcibly taken against his will.[122] There were, however, reports written by Mr Harry Kitching that indicated Topsy agreed to Mr Gunner being removed.[123] Among the court documents was a 'Form of Consent by a Parent' containing a thumbprint that was said to be that of Mr Gunner's mother.[124]

However, even if it is accepted that Mr Gunner's mother placed a thumbprint on a 'Form of Consent by a Parent', did she understand the nature of the document? O'Loughlin J accepted that there was no way of knowing whether Topsy understood the document.[125] Even if the court's conclusion that Topsy did consent is accepted, what degree of pressure was brought to bear on Mr Gunner's mother? The court accepted that Mr Gunner was removed on the recommendation of Mr Kitching, who had sought to persuade Topsy to consent to Mr Gunner's removal.[126] In seeking Mr Gunner's mother's consent what pressure did Mr Kitching bring upon her? In the course of the judgment in *Cubillo 2*, O'Loughlin J refers to a number of incidents when pressure was brought to bear upon Aboriginal mothers to force them to give up their children in circumstances when clearly they did not want to. Was Mr Gunner's mother the subject of similar inappropriate pressure? Mr Skinner's evidence that Mr Gunner's mother did not want him to be taken,[127] and the thumbprint on the consent form, could be reconciled if Mr Gunner's mother had been so pressured. If she was so pressured, then again Mr Gunner's case would fall within the scope of the Commission's terms of reference.

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118 *Cubillo 1* [1999] FCA 518, para 442.

119 *Cubillo 1* [1999] FCA 518, para 423.

120 *Cubillo 2* [2000] FCA 1084, para 56.

121 *Cubillo 1* [1999] FCA 518, para 30.

122 *Cubillo 2* [2000] FCA 1084, paras 13, 806 and 807.

123 *Cubillo 2* [2000] FCA 1084, para 838.

124 *Cubillo 1* [1999] FCA 518, para 28; *Cubillo 2* [2000] FCA 1084, paras 782 and 838.

125 *Cubillo 2* [2000] FCA 1084, para 788.

126 *Cubillo 1* [1999] FCA 518, para 28; *Cubillo 2* [2000] FCA 1084, para 12.

127 *Cubillo 2* [2000] FCA 1084, para 838.

As to the second step in this analysis, O'Loughlin J's statement may simply involve a denial that such a policy existed in the Northern Territory. However, O'Loughlin J's judgment in *Cubillo 2* details extensive documentation establishing the existence of a policy of removing part-Aboriginal children in the Northern Territory so they may be assimilated into white society.[128] Yet it appears that O'Loughlin J intended his statement to be interpreted in this way. Thus, in the course of *Cubillo 2,*[129] he states:

> The evidence in this trial was limited to events that occurred in the Northern Territory of Australia; no evidence was placed before the Court concerning 'the Stolen Generation' in the States. This brief summary should be sufficient, without more, to explain why the evidence in this trial cannot be used as a base to examine the breadth of the term 'the Stolen Generation'.[130]

Thus he seems to suggest that, while the practice of removing part-Aboriginal children from their families may have existed in some states, he was only required to consider its existence in the Northern Territory.[131]

Before this 'geographical' issue is left, it should be added that the Commission's Report *Bringing Them Home* includes details of the removal of part-Aboriginal children in the Northern Territory without their families' consent. O'Loughlin J accepts that this report does detail the existence of this policy in the Northern Territory, but states that 'the report was not referred to during this trial by any counsel; it was not tendered in evidence and a Court of Law is bound to decide the case that is before it upon the evidence — and only the evidence — that is placed before it by one or other of the parties to the litigation'.[132] Thus O'Loughlin J seems to suggest that, as counsel failed to refer to the report, he was entitled to make a conclusion contrary to the findings detailed in that report. This comment too reinforces the view that O'Loughlin J intended the subject statement to be interpreted in this way.

Further, and related to comments made above, O'Loughlin J added that he believed the material in the Commission's Report dealing with the Northern Territory would have had minimal relevance in this case, given (i) they involved persons who 'had been forcibly removed and detained in the institutions against their will and the will of their parents'; (ii) they relate 'to events that preceded the Second World War'; and (iii) they pertain to the

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128 See for example [2000] FCA 1084, paras 165–268.

129 [2000] FCA 1084.

130 [2000] FCA 1084, para 5.

131 It will be seen that this statement can be reconciled with O'Loughlin J's acceptance of the documentary evidence of an official policy in the Northern Territory of removing part-Aboriginal children so they may be assimilated. This is because, as discussed below, he concluded there was no 'policy of *indiscriminate* removal irrespective of the personal circumstances of the child' in the Northern Territory.

132 [2000] FCA 1084, para 67.

specific circumstances of the subject institutionalisations.[133] Thus again, by focusing on the particular findings he made with regard to Mrs Cubillo's and Mr Gunner's circumstances, the Commission's documentation on the policy of removing part-Aboriginal children in the Northern Territory was asserted as not being relevant.

As to the third step in the analysis, specifically, the above quoted statement merely denies a policy of '*indiscriminate* removal and detention of part-Aboriginal children, irrespective of the personal circumstances of each child'.[134] By confining the statement's impact in this manner, it could be said that O'Loughlin J was merely echoing the terms of section 6 of the *Aboriginals Ordinance 1918* (NT), which gave the Director of Native Affairs the legislative authority to remove a part-Aboriginal child from his/her family. As O'Loughlin J noted, the power could only be exercised if it was in the director's opinion that it was necessary or desirable in the interests of the child, to place him or her in care.[135] To this end, the Commonwealth submitted in the *Cubillo case* 'that there was no general policy of forced institutionalisation of part-Aboriginal children in their time ... unless it was a case of neglect or harm, no child was removed without the consent of his or her mother'.[136]

To this end, O'Loughlin J notes in his judgment the evidence of the former officers of the Native Affairs Branch, witnesses for the Commonwealth, who 'all denied the existence of a general or widespread policy of removal of part-Aboriginal children and most of them insisted that no child was removed without the consent of the mother of that child'.[137] O'Loughlin J also noted that the official documents at the relevant time, 'while strongly favouring a policy of assimilation, claimed to do so upon the premise that it was in the best interests of the child'.[138] Thus O'Loughlin J was of the view that the:

> evidence showed that broad generalisations cannot be made. In particular, the mere fact that a part-Aboriginal child was placed in an institution does not, without more, justify that person claiming that he or she is a member of 'the Stolen Generation'. In every case it will be necessary to question why was the child institutionalised? Who was responsible? And was it necessary or desirable in the interests of the child?[139]

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133 [2000] FCA 1084, para 67.

134 *Cubillo 2* [2000] FCA 1084, para 300; *Cubillo 3* [2001] FCA 1213, Summary at 2.

135 *Cubillo 2* [2000] FCA 1084, Summary para 4.

136 [2000] FCA 1084, para 5.

137 [2000] FCA 1084, para 28. The court found, however, that the documentary evidence showed the mother's consent to her child's removal was not required: [2000] FCA 1084 para 268. It also detailed the forcible removal of part-Aboriginal children at Wave Hill without their parents' consent: [2000] FCA 1084, para 207.

138 [2000] FCA 1084, para 5.

139 [2000] FCA 1084, para 5.

Hence O'Loughlin J appears to agree with the Commonwealth submission that there was no policy of 'indiscriminate' removal and detention of part-Aboriginal children, 'irrespective of the personal circumstances of the child'.[140] Rather, children were removed either because it was necessary to place them in care or because their parents had consented. As noted above, he concluded on the facts that Mrs Cubillo could not prove she had not been taken with her guardian's consent,[141] and that Mr Gunner's mother had consented to his removal.[142] As also noted above, in light of the evidence, such findings and/or the degree to which that consent was freely given are questionable.

However — even if, on the facts before him, O'Loughlin J believed the plaintiffs had not been the subject of a policy of 'indiscriminate' removal — it is submitted it was inappropriate for him to make a general statement that suggests others were not so removed. The Commission's Report *Bringing Them Home* established that such separations were effected without the consent of the child's family and in the absence of parental neglect.

Further comment must also be made in regard to O'Loughlin J's assertion that, in essence, the mere fact that a part-Aboriginal child was placed in an institution does not mean that child had been wronged,[143] because, *inter alia*, the policy was based on the 'best interests of the child'.[144] First, it is submitted that forcible separation *per se* can be seen as effecting a wrong even if that separation was pursuant to a misguided belief that it was in the interest of the child to be integrated into white society. In *Cubillo 2*, O'Loughlin J poignantly notes the heartbreaking experience of forcible separation of a child from his/her parent.[145] He similarly notes that, even when the parent parts with the child voluntarily, 'the parting is most often a cause for deep anguish'.[146] The Commonwealth equally conceded the trauma that might have occurred whether or not the separation was voluntary,[147] but asserted that — despite the significant risk of pain and trauma — it was believed better to remove the part-Aboriginal child from their environment.[148] In support, O'Loughlin J goes on to note that the High Court in *Mace v Murray*[149] declared that the bond between mother and child may have to give way to other considerations.[150]

However, the High Court in that case acknowledged: [151]

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140 *Cubillo 2* [2000] FCA 1084, para 300. See also *Cubillo 3* [2001] FCA 1213, Summary at 2.

141 *Cubillo 2* [2000] FCA 1084, paras 503, 511, 1167, 1264 and 1538–39.

142 *Cubillo 2* [2000] FCA 1084, paras 787, 790, 838, 1133 and 1167.

143 [2000] FCA 1084, para 5.

144 [2000] FCA 1084, para 5.

145 [2000] FCA 1084, para 64.

146 [2000] FCA 1084, para 64.

147 [1999] FCA 518, para 13.

148 [1999] FCA 518, para 13.

149 (1955) 92 CLR 370 at 385.

150 [2000] FCA 1084, para 64.

151 *Mace v Murray* (1955) 92 CLR 370 at 385.

> It must be conceded at once that in the ordinary case the mother's moral right to insist that her child shall remain her child is too deeply grounded in human feeling to be set aside by reason only of an opinion formed by other people that a change of relationship is likely to turn out for the greater benefit of the child. It is apparent, too, that a court which is invited to make an order of adoption must appreciate that the child is another's, and that only the most weighty and convincing reasons can justify the involuntary breaking of a tie at once so delicate and so strong as the tie between parent and child.

Thus the High Court asserts that, just because persons other than the mother believe the child will benefit from the removal of the child from the mother, that will not suffice to justify a separation.[152] Only 'weighty and convincing reasons' would justify an involuntary breaking of that tie.[153] Such a 'weighty and convincing reason' was the mother's total rejection of the child from the moment of birth.[154] That the child would be better off in white society, no matter how well intended, could hardly fall within the 'weighty and convincing reasons' test that could justify forcible separation. Thus the courts have recognised that: 'In retrospect, many would say that the risk of a child suffering mental harm by being kept away from its mother and family was too great to permit even a well-intentioned policy of separation to be implemented.'[155] Hence Dawson J in *Kruger v The Commonwealth*[156] acknowledged that this policy of assimilation 'did not promote the welfare of Aboriginals'.

Second, and related to this last point, O'Loughlin J seems loathe to evaluate whether the policy of removing part-Aboriginal children was truly in the best interests of those children who were removed. The Commonwealth asserted in its defence that:

> the policies were grounded upon the belief that in some circumstances it was better to remove a child from its environment than to leave him or her there ... welfare schemes, giving effect to a scheme that results in separation, were not designed to inflict pain but to protect and assist the child, placing its interests first ...[157]

The Commonwealth pleaded that, in turn, the exercise of the power of removal must be 'determined by reference to standards, attitudes, opinions and beliefs prevailing at the time of its exercise and not by reference to contemporary standards, attitudes, opinions and beliefs'.[158] O'Loughlin J agreed, asserting that it 'is a truism to say we live in changing times. What was

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152 *Mace v Murray* (1955) 92 CLR 370 at 385.

153 *Mace v Murray* (1955) 92 CLR 370 at 385.

154 *Mace v Murray* (1955) 92 CLR 370 at 385.

155 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36.

156 (1997) 190 CLR 1.

157 [1999] FCA 518 para 13.

158 [2000] FCA 1084 para 84.

accepted yesterday is rejected today.'[159] Thus O'Loughlin J maintained that he must adjudge the plaintiffs' claims in light of the standards that were acceptable at the relevant times[160] — namely, 1947 when Mrs Cubillo was removed and 1956 when Mr Gunner was removed.

This approach has judicial support.[161] In *Kruger v The Commonwealth*,[162] for example, Brennan CJ asserted it would be erroneous 'to hold that a step taken in purported exercise of a statutory discretionary power was taken unreasonably ... if the unreasonableness appears only from a change in community standards that has occurred since the step was taken'. In *Williams v The Minister No 2*,[163] the court noted this principle, asserting that: 'Irrespective of today's standards, it was felt in the 1940s that assimilation of Aborigines into the community was in the best interests of the Aborigines.' Abadee J asserted that the government's policy of assimilation — particularly assimilating 'part Aboriginal children who were 'white' in appearance' — reflected the 'values and standards, of the time'.[164] However, O'Loughlin J in *Cubillo 2* found that, as early as the 1940s, 'the importance of affection in a child's normal development and the role played by parental affection in behaviour disorder' had been recognised.[165] Moreover, from his review of the documentary evidence, 'as early as 1911, it was recognised that there would probably be an outcry from well meaning people about depriving the mother of her child ...'[166] O'Loughlin J also documented, in regard to the distressing removal of five part-Aboriginal children from Wave Hill on 26 August 1949, a letter to the Northern Territory Government Administrator which stated: [167]

> 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.

This is not a lone example of the public criticism that was expressed in regard to the removal of part-Aboriginal children from their families.

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159 [2000] FCA 1084 para 85.

160 [2000] FCA 1084 paras 85 and 109.

161 In the context of the Canadian Indian Residential Schools litigation see *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228 at 249–50. See also *M(M) v F(R)* (1997) 52 BCLR (3d) 127; *A(C) v C(JW)* (1997) 35 BCLR (3d) 234; (1998) 166 DLR (4th) 475; *G(ED) v Hammer* (1998) 53 BCLR (3d) 89.

162 (1997) 190 CLR 1 at 36–37. See also Dawson J at 53–54, Toohey J at 97 and Gummow J at 158.

163 [1999] NSWSC 843, paras 88 and 92–94. See also *Williams v Minister, Aboriginal Land Rights Act 1983 [No 1]* (1994) 35 NSWLR 497 at 514, 519 and 520.

164 [1999] NSWSC 843, para 88.

165 [2000] FCA 1084, para 1455.

166 [2000] FCA 1084, para 267.

167 [2000] FCA 1084, para 228.

O'Loughlin J also notes in his judgment the public outrage at the treatment of part-Aboriginal children during the 'Mulgoa incident' in 1949.[168] Thus O'Loughlin J noted, *inter alia*, that in the early 1950s 'growing public opinion ... did not approve of any policy of removing part-Aboriginal children from their families'.[169] In this regard, O'Loughlin J accepted the evidence of Dr McGrath, a historian, who noted, in regard to 'contemporary attitudes to the policy and practice of removal of part Aboriginal children in the Northern Territory between 1947 and 1963 ... that there was disquiet and sometimes deep concern about the general policy and practice of removal of Aboriginal children from their families'.[170] Even one of the Commonwealth's witnesses accepted that such forcible removals of part-Aboriginal children 'would have been completely unacceptable to the general community of the Northern Territory at the time'.[171] Thus Abadee J was erroneous to assume the Commonwealth's view that it was in the best interests of the child to remove him/her from his/her family was a view shared by all. This was so even during the periods when Mr Cubillo and Mr Gunner were removed from their families.

O'Loughlin J goes further than Abadee J, however, rejecting that it is a judicial function to determine whether this policy was misguided. He says that the appropriateness of the policy of removal of part-Aboriginal children was 'a matter of social conscience',[172] rather than law. As noted above, he asserted that it is for the 'Historians ... to adjudicate on the social policies of former Governments and it ... would not be proper for this Court to go beyond the boundary of the legal issues that are to be determined.'[173] Surely, whether the removal of part-Aboriginal children from their parents was truly in the best interest of such children was a matter that pertained to this case. If it were concluded that removal *per se* was not in the best interests of Mrs Cubillo and Mr Gunner, the issue would have been central to the litigation in that case. Moreover, even if it was determined that such a removal was appropriate where there was either clear, free consent of a parent or guardian or there had been neglect or abuse of the child, for the reasons detailed above regarding the issue of plaintiffs' guardians' consent, such an issue was also relevant in this case. Was it in the best interests of the child, even when viewed at the relevant date, to put pressure on an Aboriginal mother to give up her child? This issue

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168 A group of children had been evacuated from Mulgoa in New South Wales to Darwin. It was reported in a newspaper that one child, a 14-year-old girl, Joyce, was forced to leave New South Wales against her will. A public outcry ensued. See further *Cubillo 2* [2000] FCA 1084, paras 214 and 232.

169 [2000] FCA 1084 para 220. See also the extracts from Schultz (1995), quoted *Cubillo 2* [2000] FCA 1084, para 212.

170 *Cubillo 2* [2000] FCA 1084, para 232.

171 [2000] FCA 1084, para 213.

172 [2000] FCA 1084, para 79.

173 [1999] FCA 518, para 5; [2000] FCA 1084, para 105. See also [2000] FCA 1084, para 79, quoting *Nulyarimma v Thompson* (1999) 165 ALR 621 at 638–39.

was a matter appropriate for judicial scrutiny, not just historical analysis as O'Loughlin J suggests.

Fourth, and related to the last point, when narrowly construed, O'Loughlin J's statement merely denies that *all* part-Aboriginal children were subject to a policy of indiscriminate removal and detention. To this end, it should be noted that, later in his judgment, O'Loughlin J returned to this finding and reiterated that 'there was nothing in any of the writings that would justify a finding that all part Aboriginal children had to be removed or that all illegitimate part Aboriginal children had to be removed or that all illegitimate part Aboriginal children living in native camps had to be removed'.[174] Thus he asserted:

> the evidence does not deny the existence of the stolen generation and there was some evidence that some part Aboriginal children were taken into institutions against the wishes of their parents. However, I am limited to making findings on the evidence that was presented to this Court in these proceedings; that evidence does not support a finding that there was any policy of removal of part Aboriginal children such as that alleged by the applicants ...

In essence, O'Loughlin J has lifted the evidential bar by requiring proof that 'all' part-Aboriginal children or 'all' illegitimate part-Aboriginal children or 'all' illegitimate part-Aboriginal children living in native camps were forcibly removed before he would accept the plaintiffs' allegations as to the relevant government policy.

Finally, it will be apparent from a combination of the facts discussed above that ultimately O'Loughlin J's attitude was that the plaintiffs bore the burden of proof[175] and they had failed to prove that they had been removed pursuant to a policy of 'indiscriminate removal and detention of part-Aboriginal children' in the Northern Territory.[176] To reiterate, he asserted that counsel had failed to refer him to the Commission's Report *Bringing Them Home*, which includes details of the existence of this practice in the Northern Territory.[177] O'Loughlin J declared that, in any case, the personal histories accounted in that report pertained to an earlier time frame than that of the plaintiffs and included different circumstances.[178] This approach enabled him to accept the evidence of the former officers of the Native Affairs Branch whom, as noted above, 'all denied the existence of a general or widespread policy of removal of part Aboriginal children and most of them insisted that no child was removed without the consent of the mother of that child'.[179]

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174 *Cubillo 2* [2000] FCA 1084, para 1160.

175 See *Cubillo 2* [2000] FCA 1084, Summary, para 10.

176 Summarised in *Cubillo 3* [2001] FCA 1213, Summary.

177 [2000] FCA 1084, para 67.

178 [2000] FCA 1084, para 67.

179 [2000] FCA 1084, para 28

On a related point, later in his judgment O'Loughlin J adds: 'If, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of these applicants.'[180] O'Loughlin J found that there was a 'huge void' of evidence in many important areas of Mrs Cubillo's case[181] because of the death of key witnesses and the loss of documents. As noted above, he held that, in essence, she had failed to prove her removal from her family was 'indiscriminate'. Similarly, in Mr Gunner's case, O'Loughlin J held his removal from his family was not 'indiscriminate', but rather with his mother's consent.[182] Thus O'Loughlin J stressed 'there is a distinction between the identification of a policy and the manner in which such a policy was administered'.[183] Proof of the existence of such a policy did not suffice. The plaintiffs had to show that it had wrongly been administered to them.[184] O'Loughlin J held they had failed to do this.

Conclusion

Thus the comment may merely amount to an assertion that, in this case, the plaintiffs had failed to prove the existence of such a policy — or, if the policy existed, it was not applied to the plaintiffs. At its broader level, however, it is factually inaccurate. The plight of the Stolen Generation is now well documented and this evidence shows that not all the part-Aboriginal children who were taken from their families were neglected or taken with their parents' consent. Members of the Aboriginal community, including those of the Northern Territory, have been the subject of indiscriminate removal simply on the basis of being part-Aboriginal.

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