

Submission to Royal Commission into Institutional Responses to Child Sexual Abuse

Issues Paper 5

Civil Litigation

Introduction

This submission was prepared by knowmore on behalf of Barbara Cummings an Aboriginal woman who lives and works in Darwin, Northern Territory.

Barbara is the author of *Take This Child: From Kahlin Compound to Retta Dixon Children's Home* (Aboriginal Studies Press, 1 January 1990), a social history of Kahlin Compound and Retta Dixon Home. Throughout the 20th century these two homes formed part of the state response to so called 'part-Aboriginal' children in the Northern Territory.

Barbara is a long-time advocate for the shared history of the Stolen Generation in the Northern Territory and was a resident of Retta Dixon. She is also a long term member of Karu (the Aboriginal Child Care Agency in Darwin) and was a facilitator of the Going Home Conference that was held in Darwin in 1994.

This submission relies on material contained in the manuscript for *Take This Child*, a richer source of information than the published work.

In summary, this submission seeks to highlight:

- In the case of the Northern Territory's Stolen Generation civil litigation has not delivered justice or benefits to children who were harmed following removal by the Commonwealth under laws that were in place for the 'benefit' of Aboriginal and 'part-Aboriginal' people.
- The litigation is a good example of the lengths that governments take to defend actions of this nature, and the attitude that children who were harmed must look to the institution.
- The failure of civil litigation leads to a perception that those who were responsible have 'got away with it'.
- The remedies available through civil litigation cannot take into account the harm experienced by a group of people. For example, in the case of the Northern Territory Stolen Generation one consequence of removal, and the resulting social exclusion, was lack of ability to be recognised as a traditional owner of land under the *Aboriginal Land Rights (Northern Territory) Act 1976*.
- The individualised approach of civil litigation obscures the way laws and public policies affect members of a particular group whose members are being targeted by specific laws and policies.

Background

Removal and placement of Aboriginal children into institutions in the Northern Territory occurred under race based legislation and policies. The *Aboriginals Ordinance 1918* applied to Aboriginal and part-Aboriginal people and children. The *Welfare Ordinance*

(1953) which came into effect in 1957, applied to wards. However its effect was that Aboriginal people were declared wards, and a 'part-Aboriginal' person could be declared a ward by the Administrator on the basis of the person's manner of living, ability to manage his or her affairs, standard of social habit and behaviour, personal associations, if the person was in need of special assistance. The legislation could not apply to people who were eligible to vote.

As well as race based legislation, children were placed in specific purpose government or mission/church institutions. These institutions were developed and maintained for children who were considered to be 'half-caste' by the relevant authorities.

Take This Child focuses on two of those institutions: the Half- Caste Home established in Darwin and the Retta Dixon Home for Children established in Darwin in 1946.

Take This Child documents not only the laws and policies that underpinned the removal of part-Aboriginal children into these two institutions but also personal stories of people who were taken to those institutions.

The Retta Dixon Home was operated by the Aboriginal Inland Mission (AIM) now known as the Australian Indigenous Mission. The AIM also operated other institutions in the Northern Territory (for example, the AIM operated the 'depot' at Philip Creek where Lorna Cubillo and other children were taken into care prior to removal to Retta Dixon Home).

The AIM commenced activities in the NT in 1939. From around 1946 to 1984 the AIM received Commonwealth government financial and in kind support to operate the Retta Dixon Home and to undertake activities associated with the removal of 'part Aboriginal children'. The Home was built on Commonwealth land. Food was supplied to the home by the government. Children from the home were transported to a local public school by government transport. The home was staffed by missionaries.

Ms Cummings' mother was a resident of Kahlin Compound, and Ms Cummings was a resident of Retta Dixon Home.

Take This Child locates the removal of 'part-Aboriginal' children to institutions within the broader context of laws, policies and attitudes that supported the control and containment of Aboriginal people, such as measures that were in place to contain Aboriginal people on reserves and restrictions on marriage between Aboriginal people and non-Aboriginal people. Aboriginal settlements and children's institutions were developed to keep Aboriginal people out of towns and to prevent Aboriginal people from 'inconveniencing' pastoralists and miners.

The policies of segregation and assimilation of the Commonwealth that authorised the removal of children also contributed to the production of the identity of 'part-Aboriginal'.

"We have been variously called 'half-castes', 'octoroons', 'coloured', 'part-coloured' (how can you be 'part-coloured', especially as previously having been classified as 'coloured'?) or 'part-Aborigines' depending on the direction of policy and legislation at any given time. Interestingly, we have never been called 'part-white' or part-European" (manuscript 325).

Despite the changes made to laws and policies over the course of the 20th century so that they were no longer race specific, no effort was made to return or reunite children with their families until Karu (the Aboriginal Child Care Agency in Darwin) was established in the 1980's.

Paternalistic laws and policies such as the *Aboriginals Ordinance*, combined with social exclusion, lack of education and political empowerment lead to enduring perceptions that Aboriginal mothers did not have legal jurisdiction over their children, or that 'part-Aboriginal' children were state wards even after 1953. The system of control exercised over Aboriginal people in the first half of the 20th century created an atmosphere of duress and undue influence.

"We were condemned because of our Aboriginal heritage; in being condemned we and our mothers before us became the subjects of restrictive legislation which took as its basic assumption our inferiority." (manuscript page 324)

Stolen Generation civil litigation

Two cases have been brought against the Commonwealth government by people who were removed under the Northern Territory laws: *Kruger v Commonwealth*¹, and *Cubillo v Commonwealth*.² Neither of these cases were successful.

Kruger challenged the validity of the laws that permitted the removal of 'part-Aboriginal' children in the Northern Territory.

In *Cubillo* the claimants only sought relief from the Commonwealth, and not the Director of Native Affairs, the Aborigines Inland Mission, the Australian Board of Missions or individuals who were alleged to have abused the claimants. They sought damages on the basis of wrongful imprisonment and deprivation of liberty, negligence, breach of statutory duty and breach of fiduciary duty. The claimants also had to seek an extension of the time in which to start the proceedings under the Limitation Act (NT).

The claims in *Cubillo* were dismissed. The court decided that the Commonwealth was not responsible for abuse or harm perpetrated by individuals towards the claimants which occurred while they were in institutions, and that the claimants were not removed and detained under a general Commonwealth government policy to remove half-caste children from their families into institutions regardless of the personal circumstances of the child.

The court also decided not to extend the time to start the proceedings because of "irremediable prejudice" to the Commonwealth. The court found that significant witnesses were not available and that there were inadequate records.

Specifically the court found that:

¹ *Kruger v Commonwealth* ("Stolen Generations case") [1997] HCA 27. This case was commenced in 1995.

² [2000] FCA 1084 (11 August 2000). The claims in this case were lodged in October 1996.

- Peter Gunner had been removed with the consent of his mother (evidenced by her thumb mark on a Form of Consent).
- The Commonwealth was not responsible for violence perpetrated by an AIM missionary against Ms Cubillo.
- The Commonwealth was not responsible for sexual abuse of Peter Gunner while he was at St Mary's hostel, only the Director of Welfare had a duty of care to the claimant.

Elements of the civil litigation system

Lack of written records disadvantaged claimants

Scant records were kept about individual children subject to the Northern Territory laws by both the government and the missions. The claimants in *Cubillo* gave extensive oral evidence about their experience however the court gave significant weight to the lack of written records, and the prejudice to the Commonwealth, in deciding not to extend the time to bring the actions.

'A couple of generations of loss'

The civil litigation system focuses on individual claimants and particular incidents of harm. It cannot take account of events that take place over an extended period of time that have varying effects on people. It cannot provide redress for those affected by harm (such as the descendants of a person who was institutionalised) or for a group of people who have been harmed.

“As a result of the policies of separation and segregation since the days of Kahlin Compound the bonding between Aboriginal mother and child was in many cases irreparably severed. Some children who came into Kahlin Compound would never again see their mothers. Others, such as Ethel Buckle, Pearl Graham, Daisy Colbert, and Mavis Braun who are unable to find any living soul who remembers them, not only lost their mothers but were alienated from and lost to their entire family and hence social network. The ramifications of the acts perpetrated on these people and people like them are still being felt today among the Retta Dixon Children, the Croker Island people and those from Garden Point.” (manuscript 324-325)

Take this Child documents how generations of Aboriginal families were removed and placed in Kahlin Compound and Retta Dixon Home for Children and the social and economic consequences of that removal. By 1973, when Retta Dixon Home was in its final years and the numbers of children were dwindling, some of the children in Retta Dixon belonged to a third or fourth generation of children who were institutionalised.

Individualised justice

The civil litigation system provides an individualised approach to achieving justice and *Cubillo* could only address the particular claims brought by Mr Gunner and Ms Cubillo. This can obscure the underlying causes of harm and abuse such as racial laws and policies that drove the removal and institutionalisation of 'part-Aboriginal' children. It also obscures the harm that is done to a group of people.

Many members of the Stolen Generation in the Northern Territory formed strong relationships with each other in the absence of the opportunity to build ties with their biological families, and as a protective mechanism. The bonds developed between residents of the different homes provided the Stolen Generation with an identity and a social safety net.

The processes of individualised justice can have negative consequences in this situation as perceptions develop about what attributes or experiences should attract higher levels of compensation. For example, at one point amongst some Stolen Generation members in the Northern Territory it was considered that children who had a 'full blood' mother should be entitled to greater amounts of compensation than other children.

Responsibility

The Commonwealth government consistently maintained that the relevant institutions were responsible for harm caused to children removed under Commonwealth law and placed in those institutions, and that the actions taken with respect to 'part-Aboriginal' children in the early and mid 20th century must be assessed according to standards that prevailed at the time.

During the course of litigation the Commonwealth relied on arguments that the legislation which authorised removal of children should be characterised as welfare or caring legislation, and that actions were taken in the interests of the children who were removed to institutions. This approach does not take account of the fact that the promise of a better life held out to children and their parents was not met.

The judgment in *Cubillo*, like other judgments in claims brought by Stolen Generation members (including *Kruger*, and *Williams*³) emphasises the requirement for actions to be judged in accordance with the standards of the time in which they took place.

The failure of the litigation brought by members of the Northern Territory Stolen Generation means that legally and symbolically the Commonwealth government has avoided responsibility for all of the consequences of removal (including abuse that occurred in institutions) of Aboriginal children in the Northern Territory.

Compensation and redress

The nature of loss and harm experienced by members of the Stolen Generation includes:

- loss of family bonds and relationships;
- loss of cultural knowledge;
- loss of opportunity to be recognised as a traditional owner, and member of a land trust, under the *Aboriginal Land Rights (Northern Territory) Act 1976*;
- lack of opportunity to gain formal and informal (life) skills that could equip children to lead a meaningful and resilient lives outside of an institution; and

³ *Williams v Minister (Williams v Minister [No 2])* [1999] NSWSC 843.

- psychological trauma due to separation and subsequent physical and emotional abuse.

Compensation can be a significant part of the healing process for people who are harmed or abused. In the case of the Northern Territory Stolen Generation compensation was requested by Aboriginal people who attended the Going Home Conference in 1994, and recommended in the 1997 Bringing Them Home Report. The Northern Territory Stolen Generation supported the introduction and passage of legislation to establish a system of ex gratia payments.⁴

However the civil litigation process cannot provide redress outside of financial compensation, and formal acknowledgment (through the findings of a court) that wrongs have been committed, and harm occurred.

Other forms of redress that have been sought by the Northern Territory Stolen Generation include:

- establishment of a community centre in Darwin to provide support to Aboriginal people removed from their families;
- counselling for Aboriginal people removed from their families;
- changes to Native Title legislation and the *Aboriginal Land Rights (Northern Territory) Act 1976* to recognise rights of land for Aboriginal people removed from their families;
- policies and resources to support economic participation for Aboriginal people removed from their families;
- introduction of a bill of rights that would provide protection and safe custody of Aboriginal children and to prevent future removal of Aboriginal children from their families; and
- the development of historical information about Stolen Generations and the impact of government policies which removed Aboriginal children from their families.

Ms Cummings is currently advocating for a permanent memorial and the protection of two sites of significance in Darwin at Karu Park and Bagot (the two locations of Retta Dixon Home). For some time Ms Cummings has been negotiating with Northern Territory governments to establish a cultural centre/museum in Darwin.

Ms Cummings now proposes that the site at Bagot Community (the first location of Retta Dixon Home) should now be used to accommodate a cultural precinct and a community centre. In addition, Karu Park (the location of the 'new' Retta Dixon Home) should be the location of a memorial garden. Prior to the establishment of a garden the site should be culturally cleaned due to the number of children who continue to feel grieved by bad experiences. She hopes that the cultural cleaning can occur at the same time that the Royal Commission holds a public hearing into Retta Dixon Home.

⁴ Stolen Generation Compensation Bill 2008, introduced in the Senate by Senator Bartlett, which lapsed in 2010 at the end of Parliament.