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Legal issues in the stolen generation litigation

Melinda Richards was junior counsel for the Applicants in the case of *Cubillo and Gunner v The Commonwealth*, which is the "test case" for Stolen Generation litigation. She discusses the issues that arose in that case, which is currently awaiting judgment, in relation to the liability of the Commonwealth for the damages suffered by the applicants when they were removed from their homes and placed in missions. The results of this case will be fundamental to future Stolen Generation litigation as well as having a large impact on the liability of public authorities.

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In July 1947 Lorna Cubillo and fifteen other children were taken away from their community of Phillip Creek, near Tennant Creek in the Northern Territory. They were taken in the back of a truck driven by a Commonwealth patrol officer. All of the children on the truck were "part-Aboriginal" - or, in the language of the time "half caste". No "full blood" children were removed.

The children were taken to the Retta Dixon Home in Darwin, a "half caste" institution run by the Aborigines Inland Mission. The institution was almost entirely funded by the Commonwealth Government. Life at the Retta Dixon Home was regimented and loveless. The Home was understaffed and overcrowded. Corporal punishment was frequently used, at times to excess. On one occasion Lorna Cubillo was thrashed around her face and upper body with the buckle end of a belt. She still has the scars.

Photo by: Jules Andrews.

During their years at the Retta Dixon Home, Lorna Cubillo and the other Phillip Creek children were isolated from their families and country. They lost their Aboriginal languages and culture. Instead, they received a strict Christian upbringing.

Peter Gunner spent the early years of his life in the Aboriginal community at Utopia station, north east of Alice Springs. His father was a white stock man, his mother an Aboriginal woman. In May 1956, when he was 8 years old, Peter Gunner was committed by the Director of Native Affairs to the custody of St Mary's Hostel in Alice Springs. He spoke no English, and knew only the traditional way of life he had lived at Utopia. When he was taken to St Mary's, he was bewildered and afraid.

A Commonwealth patrol officer promised Peter Gunner's mother that he would go home for the school holidays. The promise was never kept. During his years at St Mary's Peter Gunner had no contact with his family at Utopia. He did not see his country again until many years later.

St Mary's Hostel was a "half caste" institution run by the Church of England. Like the Retta Dixon Home, it was dependent on Commonwealth funds. The institution was characterised by neglect. It was inadequately staffed, often with unsuitable people. Peter Gunner and other former inmates gave evidence that they were sexually abused by staff of the Hostel.

The detention of Lorna Cubillo and Peter Gunner in "half caste" institutions was in accordance with the Commonwealth Government's policy of removal of "half caste" children from their Aboriginal mothers and families, to institutions where the children were given a European education. The purpose of the policy was to assimilate these children into white society, and to prevent them growing up as Aboriginals. This policy, with some variations, was held by the Commonwealth Government from the 1920s until at least the late 1950s.

This is a small part of the evidence before the Federal Court in the cases brought by Lorna Cubillo and Peter Gunner against the Commonwealth of Australia. Their claims are for damages for injuries and loss caused by their removal and detention. The claims were vigorously defended by the Commonwealth, and much of the evidence is disputed. Final submissions were completed on 31 March 2000 and judgment is reserved.

A large number of legal issues were raised by the litigation. Two of these issues are particularly relevant to the legal responsibility of statutory authorities: whether the Commonwealth owed Mrs Cubillo and Mr Gunner a duty of care, and whether it could be held vicariously liable for the actions of statutory office holders.

Before going to the arguments put on these issues, it is necessary to say something about the legislative framework that enabled the removal and detention of Aboriginal children in the Northern Territory.

Legislative framework

Until 1953, all Aboriginal people in the Northern Territory were subject to the Aboriginals Ordinance 1918. In 1953, "half castes" were excluded from the definition of Aboriginal. The Ordinance was, by any measure, a remarkable piece of legislation. It intruded into almost every aspect of an Aboriginal person's life: it restricted movement, employment, marriage, personal associations, the rights of parents and property rights.

The statutory "authority" for the purposes of the Aboriginals Ordinance was the Director of Native Affairs. The Director was appointed by the Minister[1] and was, under the Administrator of the Northern Territory, responsible for the administration and execution of the Ordinance.[2] The Director was the legal guardian of every Aboriginal person.[3] His powers have been described as follows:

"The powers which the Director wields are vast, and those over whom he wields them are likely often to be weak and helpless."[4]

Those powers included a power to "undertake the care, custody, or control of any aboriginal, if, in his opinion it is necessary or desirable in the interests of the aboriginal for him to do so".[5] The Director also had power to cause any Aboriginal to be removed to and kept within an Aboriginal reserve or institution.[6] These were the powers relied upon by the Director when he committed Lorna Cubillo and Peter Gunner to institutions.

Section 13 of the Ordinance enabled the Administrator to declare and licence any institution to be "an aboriginal institution for the maintenance, custody, and care of aboriginal children", and to revoke the licence. The Director had a duty to supervise the welfare of inmates,[7] and could remove a child from an institution if the child was not being treated properly.[8]

In 1957 the Aboriginals Ordinance was repealed and replaced by the Welfare Ordinance. The Welfare Ordinance involved an elaborate pretence that it was directed at "wards", rather than the Aboriginal race. The Administrator had

power to declare a person who stood in need of the "special care and assistance" provided for by the Ordinance to be a ward.[9] However, this power was "almost confined in its application to aboriginals"[10] and almost all Aborigines in the Northern Territory, including Peter Gunner, were declared to be wards.

The Director of Welfare was appointed by the Minister and was, under the Administrator, responsible for the administration of the Ordinance.[11] He was the legal guardian of all wards.[12] Like the Director of Native Affairs, the Director of Welfare had wide powers of removal and detention.[13] He also had duties to exercise a general supervision over the welfare of wards, and to supervise and regulate the use and management of institutions such as St Mary's Hostel.[14]

Duty of care

The Applicants argued that the Commonwealth - not the Director of Native Affairs or the Director of Welfare - owed them a duty of care in relation to the removal from their families and their detention in institutions. The relationship between Mrs Cubillo and Mr Gunner and the Directors, and the duties of the Directors under the Ordinances were some of the circumstances relied on as creating the duty of care. Also relied on was the role played by Commonwealth employees in the removal and detention.

It was contended that, by removing Mrs Cubillo and Mr Gunner from family and country and placing them in institutions, the Commonwealth created a relationship with each of them which carried with it a duty to take reasonable care. As McHugh J observed in *Crimmins v Stevedoring Industry Finance Committee*:[15]

> Where the person giving the direction or in control or another person's freedom of action knows that there is a real risk of harm unless the direction is given or the control is exercised with care, the case for imposing a duty of care is overwhelming.

The Commonwealth's duty of care was said to extend to a duty to positive action to protect the welfare of Mrs Cubillo and Mr Gunner while they were detained in institutions. In this regard, the Applicants relied on their vulnerability, created by their removal as children to institutions distant from their families, and on their lack of any real opportunity to protect themselves. They belonged to a specific class - as Aborigines or wards subject to the Ordinances - that the Commonwealth, through the Directors and otherwise, had power to protect from harm.[16]

The Commonwealth contended that no duty of care arose, for a range of reasons. A principal contention was that policy considerations excluded the imposition of a duty of care on child welfare authorities. It relied heavily on the reasoning of the House of Lords in *X (Minors) v Bedfordshire Council*,[17] which concerned the exercise of statutory powers to protect children at risk, including by removing them from their families.

In that case no duty of care was imposed, for reasons of policy. Those reasons included the consideration that the task of local authorities in dealing with children at risk was "extraordinarily delicate", the difficulties created by imposing a common law duty of care on the interdisciplinary system established for the protection of such children, and the risk that local authorities might adopt a more cautious and defensive approach to their duties.[18]

X (Minors) has since been distinguished by the House of Lords in a case in which a child had been taken into care.[19] It has had a mixed reception in Australia. It was followed by the South Australian Full Court in *Hillman v Black*.[20] During 1999 it was applied by Abadee J in *Williams v The Minister, Aboriginal Land Rights Act 1983*[21] and distinguished by Studdert J in *TC v State of New South Wales*.[22]

While each case concerned the question of whether a duty of care should be imposed on a statutory authority concerned with child welfare, there were important variations in the facts and the particular statutory scheme in each case. The correct position may be that *X (Minors)* does not create any general rule excluding the existence of a duty of care in the area of child welfare. ▶

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"The Commonwealth contended that it was not vicariously liable for the conduct of the Directors... because the Directors were statutory office holders vested with an independent discretion..."

That would leave the existence of a duty of care owed by the Commonwealth to Mrs Cubillo and Mr Gunner to be assessed on the particular facts of their cases, and against the extraordinary statutory scheme under which they were detained.

Vicarious liability

The Commonwealth also contended that it was not vicariously liable for the conduct of the Directors, and could not owe a duty of care because of that conduct, because the Directors were statutory office holders vested with an independent discretion exercisable only by them. In support of this argument the Commonwealth relied on a long line of authority in relation to the "independent discretion rule", starting with *Enever v R*[23] and ending with *Oceanic Crest Shipping Co v Pillar Harbour Services Pty Ltd*.[24] While this rule has been the subject of criticism,[25] it is still good law.

It was common ground that the success of this argument depended largely on the construction of the Ordinances.[26] The Commonwealth relied on the fact that the exercise of the Directors' powers of removal and detention were dependent on the formation by them of opinions. For example, the Director's power of removal under s. 6 of the Aboriginals Ordinance was exercisable only "if, in his opinion it is necessary or desirable in the interests of the Aboriginal". The Directors were required to form an independent judgment on a question of fact, and the Commonwealth could not be held liable for such judgments.

The Applicants contended that the critical consideration was that the Directors were subject to the control of the Commonwealth. They emphasised the statutory requirement for the Directors to administer and execute the Ordinances "under the Administrator." The Administrator was, in turn, obliged to administer the Northern Territory on behalf of the Commonwealth in accordance with the instructions of the Minister.[27] Hence the Directors were not independent and acted merely as functionaries of the Commonwealth. There was also evidence to the effect that the Directors were required to and did act in accordance with policies laid down by the Minister.

The Applicants also argued that, even if the Ordinances were construed as conferring some independent discretions on the Directors, this would not be a complete answer to the Applicants' claims. The rule operates only in relation to torts committed in the exercise of an independent discretion. It could not exempt the Commonwealth from liability for torts committed in the exercise of the Directors' other functions.[28]

The outcome of the cases brought by Mrs Cubillo and Mr Gunner is as yet unknown. Whatever the outcome, it is likely that the decision will be an important contribution to the law concerning the liability of statutory authorities. PL

Footnotes:

1. The responsible Minister was, until 1951, Minister for the Interior and, after 1951, the Minister for Territories.
2. Aboriginals Ordinance 1918, s. 4(1).
3. Aboriginals Ordinance 1918, s. 7.
4. *Waters v. Commonwealth* (1951) 82 CLR 188, 194 per Fullagar J.
5. Aboriginals Ordinance 1918, s. 6(1).
6. Aboriginals Ordinance 1918, s. 16(1).
7. Aboriginals Ordinance 1918, s 5(1)(f) imposed a duty on the Director "to exercise a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud."
8. Aboriginals Ordinance 1918, s. 46(1).
9. Welfare Ordinance 1953, s. 14.
10. *Namatjira v Raabe* (1959) 100 CLR 664, 669.
11. Welfare Ordinance 1953, s. 7(1).
12. Welfare Ordinance 1953, s. 24.
13. Welfare Ordinance 1953, ss. 17-20.
14. Welfare Ordinance 1953, s. 8(a)(vii), (c).
15. (1999) 167 ALR 1, 28.
16. See *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1, 12-13 per Gaudron J, 24-25 per McHugh J, 58-62 per Kirby J.
17. [1995] 2 AC 633.
18. *X (Minors) v Bedfordshire Council* [1995] 2 AC 633, 749-751 per Lord Browne-Wilkinson.
19. *Barrett v Enfield London Borough Council* [1999] 3 WLR 79.
20. (1996) 67 SASR 490.
21. [1999] NSWSC 843.
22. [1999] NSWSC 31, (1999) Aust Torts Reports 81-500.
23. (1906) 3 CLR 96.
24. (1986) 160 CLR 626.
25. See *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409, 448.
26. See, for example, *Baume v. Commonwealth* (1906) 4 CLR 97, 123 per O'Connor J.
27. Northern Territory Government Ordinance 1911, ss. 4 and 5.
28. *Attorney-General (NSW) v Perpetual Trustee Co. Ltd* (1952) 85 CLR, 249-259 per Dixon J; *Oriental Foods (Wholesalers) Co. Pty Ltd v Commonwealth* (1983) 50 ALR 452, 455.