



GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY

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A BIT OF HISTORY

JULIAN BURNSIDE*

I was invited to write this article on the 10th anniversary of the Griffith Journal of Law & Human Dignity reflecting on key moments in my career.

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I EARLY DAYS

I did better than expected at the end of year 12. I surprised everyone, and I was offered a place in four faculties at Melbourne and Monash.¹ I had no idea what I wanted to do. I chose Law at Monash because my sister's former boyfriend was doing Law at Monash, and I thought I would be less lonely if I knew someone in the same faculty. That was my thinking, back in 1966.

University life was different back then. For a start, there was such a thing as 'university life'. It revolved around the Union building and the pub. Most students were full time – they came to the campus each day and stayed all day. There were many opportunities for mischief and diversions. It was a rare thing to see students who had day jobs and who came onto campus only for lectures and tutorials. Back then, most people did not have to pay fees, and we did not go into the world saddled with a HECS debt. Indulgent? Maybe,

* Julian Burnside AO KC barrister.

¹ The following introductory paragraphs are adapted from Julian Burnside, 'The Bludgeoning Of Chance' (Hal Wooten Lecture, University New South Wales, 31 March 2015) <<https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/law-justice/news-events/2018-12-annual-hal-wootten-lecture/2018-12-hal-wootten-lecture-2015-julian-burnside.pdf>>.

but it also meant that you could explore areas of thought simply because they were interesting, not because they might win you a job.

The relative narrowness of tertiary education today is a serious deficiency. Some of the greatest advances in human history have been the product of well-stocked minds piecing together bits of information from diverse fields. Learning that is confined to functional categories may earn you a meal ticket, but it should not be confused with an education. The point was well made by George Bernard Shaw, who said that his education was interrupted only by his schooling.

Although I was studying law, I had no particular plan to be a lawyer. I wanted to be an artist. But I also wanted an income, so I enrolled in Economics, with a view to becoming a Management Consultant.

Back then, as I recall, mooting was optional (mooting is a kind of pretend appeal). It was the sport of nerds, and I gravitated to it. In my second-last year, I was chosen as part of the Monash mooting team to compete in intervarsity mooting in New Zealand. I had never even been to Tasmania, so a free trip to New Zealand was very exciting.

I won the Blackstone Cup as best individual speaker. The Chief Justice of New Zealand presided over the final moot. He was talking to me at the prize-giving/drinks function and asked what I planned to do. I said I thought I was going to be a Management Consultant. He said I should go to the Bar. He was the most important person I had ever met, so I agreed (it occurred to me later, that he may have meant "Go and get another glass of wine").

For Christmas that year, I was given a biography of the great American trial lawyer, Clarence Darrow. He was a great role model. Darrow believed passionately in his clients' cause, and win, lose or draw, his clients always knew Darrow had done his best. He fought passionately for causes, including Justice for Trade Unionists and the abolition of capital punishment.

Darrow once said, "Laws should be like clothes: they should fit the people they serve." It is that book which made me want to be a barrister.

My early years at the Bar were quiet and uneventful. I had no connections in the law. Appearances were infrequent and mostly unexciting. For the first few years, I imagined myself the victim of a defective phone, or perhaps of some dark conspiracy to

keep briefs away from me. Most of my friends were doing better than I was. While Clarence Darrow was the reason I wanted to be an advocate, most of the early work I got was from the Tax office – I had an Economics degree, and could understand accounts quite easily.

But spare time offers great opportunities. In the late 1970s I became interested in learning how computers work. Here's some ancient history for you: The transistor was devised in 1947, the integrated circuit was developed in 1962, the microprocessor was developed in 1971, the first 'microcomputer' was available on the market by about 1975, and the PC (personal computer) was launched by IBM in 1981. In 1982, IBM began selling PCs with a new operating system made by a Seattle company called Microsoft. It was MS-DOS, and rapidly became the standard operating system for personal computers. In 1985 Microsoft introduced version 1.0 of its Windows operating system.

By 1981, when the PC was introduced, I was on my third computer and was beginning to use computers for litigation support. That year the *Australian Law Journal* published an article I had written in which I ventured some thoughts about the legal implications of computers.²

I suggested the need for the law to deal with the possibility that computers might be used for novel kinds of criminal activity and might give rise to problems concerning intellectual property. In addition, I suggested that computers might be useful tools in legal practice. This idea was politely dismissed by most as a harmless eccentricity. It turned out to be more accurate than I could have imagined. When I visited him in the Ecuadorian Embassy in London, Julian Assange reminded me that I had acted for him, when he was a teenager charged with some computer-related offences. Not many legal practices operate without computers these days, and computers are ubiquitous in big litigation. Without any pretence at modesty, I am probably still ahead of the curve when it comes to techniques of using computers in litigation.

Back then, you qualified as a high-tech lawyer if your secretary had a golf-ball typewriter, and here I was writing about using computers in legal practice! My friends thought I was a harmless lunatic.

² J W K Burnside, 'The legal implications of computers' (1981) 55(2) *Australian Law Journal* 79.

The simple fact is that, if you keep your mind open and learn every possible thing that attracts your interest, you will be ready when the right opportunity comes along. It doesn't matter a scrap if you don't know in advance what that opportunity is going to be.

All the while, I was driven by what I had read about Clarence Darrow. It took a long while before I got the sort of case that would have interested him. But in early 1998 I was sitting in chambers when the phone rang. It was a solicitor asking if I could take a brief in the case between Patrick Stevedores and the Maritime Union of Australia (MUA). I asked when it would be, and he said March or April. Reluctantly, I said that I was not available because I was about to be married and I would be on my honeymoon. When I was first married, I did not take time for a honeymoon. This turned out to be a fatal mistake. I was not going to make the same mistake again. I said No, with the regret that only a barrister can fully understand. At home that night I told Kate what a good bloke I'd been, saying No to a brief so that we could have a honeymoon. She asked what the case was. I said that it was something about the Maritime Union of Australia and Patrick Stevedores. She said, "That's going to be a terrific case – you should have said Yes". She even suggested that I should ring the solicitor back and say that I was free after all, but that would have been quite improper.

II WORKER RIGHTS

I was feeling a bit crestfallen in chambers the next day when the phone rang again. It was another solicitor offering me a brief in the matter of the MUA against Patrick Stevedores. I said that I was available. The solicitor was Josh Bornstein of Maurice Blackburn, acting for the Union. The day before, it had been the solicitor for the Victorian Farmers' Federation. By such small things is our future decided.

When I took the brief for the MUA I had a vague distaste for unions generally and an impression that the MUA was among the most troublesome of them. After all, I had grown up in a household in which Unions were seen as a dangerous force, and governments were close to perfect. Perhaps that background made me ready to see the alternative view. Relations between the Union and Patricks had not been good for some time. Patrick Stevedores had been sprung seeking to train a group of mercenaries to stevedore ships. This operation had been carried out in Dubai, which raised eyebrows and suspicions.

Early in 1998, rumours began to circulate that Patricks were about to do something drastic.³ As the weeks went by, the rumour firmed into a suggestion that Patricks were about to dismiss the entire unionized workforce on the Australian waterfront. Rumours are not evidence and so there was not much to work with. Innocent of any knowledge about the *Workplace Relations Act*, I asked what would happen if Patricks acted as the rumour suggested. Those in the team who are cleverer and better informed than I am, told me that the workforce would be reinstated, because of the provisions of the *Workplace Relations Act*. I asked innocently if there were any exceptions to that. They said that the only exception was if Patricks were going out of the business of stevedoring. Well, if they were to go out of the business of stevedoring, Patricks would have to sell their assets, so I suggested that we should write to Mr Corrigan asking for an undertaking not to dispose of Patrick's assets and not to dismiss the workforce. If he did not give the undertaking sought, then his refusal would provide the evidence we needed.

He treated the request dismissively. He did not give the undertaking. We prepared a motion for injunctions, returnable on the Wednesday before Good Friday. The motion simply sought an order restraining Patricks from disposing of its assets or sacking its workforce.

On Wednesday morning, 8th April 1998, Australia woke to headlines saying that the entire workforce of Patrick Stevedores had been dismissed and had been replaced by an alternative, non-unionized workforce. When I arrived in court, Counsel for Patricks told me that administrators had been appointed to Patrick Stevedores. This was a surprising turn of events. My time practising as a commercial junior in the 1970s and 1980s made me think immediately of Bottom of the Harbour schemes. I thought that probably the court would be unimpressed by Patricks acting precipitately and doing the very thing which the court had been asked to restrain.

The Judge granted a holding injunction and directed that the matter should come back for further argument after Easter. Patricks were required to provide us with all relevant documents showing what had gone on. The picture revealed by those documents was truly astounding. In September 1997, the assets of the main stevedoring companies had

³ The following recollections about *Patrick Stevedores v Maritime Union of Australia* (1998) 195 CLR 1 were published previously as Julian Burnside, 'Are We There Yet?' (Web Page, 7 March 2020) <<http://www.julianburnside.com.au/?s=patrick+stevedore>>.

been sold to new companies and the resulting credit balances were sent upstream to the holding company. The companies which had always employed the workforce – apparently large and successful stevedoring companies – were left with two assets only: their workforce, and contracts to provide the workforce to the new owners of the assets. These labour hire contracts were, in effect, terminable at will by the company with the assets. The employees had no job security whatever and no means of knowing the fact.

The effective result of this arrangement was that the labour hire company could be jettisoned without harming the enterprise. This made it possible to dismiss the entire workforce in a single stroke. On the ground, nothing at all had changed: Patrick Stevedores still had the appearance of prosperity which it had enjoyed for many decades, but it was a mere shell. The workforce was hostage to a corporate shadow, and a CEO with secret plan.

The only party bound to gain from this strategy was the company which owned the assets. The only people bound to lose were the employees. As it happened, an obliging Federal Government had agreed in advance to provide the labour hire company with enough cash to pay the accrued entitlements of the employees when the workforce was sacked en masse. Thus, the risks associated with the stevedoring venture were transferred to the workers and underwritten by a government enthusiastic for waterfront reform at any price.

The case ran at an astonishing pace. We resumed argument before Justice North on the 15th of April. The argument ran for three days. On the 21st of April, Justice North delivered his judgment and granted injunctions pending trial. At 3 o'clock that afternoon the Full Federal Court convened by video-link (with Justice Wilcox in Sydney, Justice Von Doussa in Adelaide and Justice Finkelstein in Melbourne). They ordered a stay of Justice North's orders pending appeal.

The Full Court appeal began the next day, 22 April, and ran over to the 23 of April. At 7 o'clock that night the Full Court gave judgment, upholding the order of Justice North. At 10 pm Justice Hayne in the High Court granted a stay of the Full Court's orders, pending an application for special leave to the High Court.

On Monday, 27 April the seven judges of the High Court convened in Canberra and began hearing Patrick Stevedores' application for special leave to appeal from the Full Federal

Court's orders. The application ran until the afternoon of Thursday, 30th April. The following Tuesday, 4th May the High Court delivered judgments upholding the judgment of Justice North. The process of going from Judge at first instance to appeal to special leave to a final hearing by the High Court took three weeks. Ordinarily it would take between three and five years.

It was an exciting case which significantly shifted my previous, naïve belief that governments in Australia behaved honestly. It also left me with a significantly changed view of the importance of unions. On the day that the High Court upheld the Union's case, Josh and I were approached by a member of the cleaning staff of the court who said, "Thanks for that fellas, we all feel a bit safer now". Of course, Work Choices hadn't been heard of at that time. But his point was a good one: If an employer could crush the MUA, then no employee in Australia was safe. Union power, responsibly exercised, redresses the imbalance of power between employers and the individual employee.

The MUA case made me famous in a way I had never imagined possible. It opened the way for me to do a lot of other important cases – in effect, to follow the Clarence Darrow model. In 1998, I got the chance I had been waiting for.

III ASYLUM SEEKERS

In the middle of 2001, I was asked if I would act pro bono for the asylum seekers who had been rescued by the Tampa. On the 26 August 2001, the Palapa (a small, dilapidated boat carrying Afghan Hazara asylum seekers) was heading across the Indian Ocean from Indonesia towards Christmas Island. The boat began to disintegrate. A Norwegian cargo vessel, the Tampa, was asked by Australia to go to the aid of the Palapa. It did. Captain Arne Rinnan thought that the boat might be carrying 40 or 50 people. In fact, 434 people clambered up the rope ladder from the disintegrating Palapa onto the steel deck of the Tampa. I knew nothing about refugee law or refugee policy, but since childhood I have felt the heat badly, and here were these people who were stuck on the steel deck of a ship in the tropical sun, near the equator. It sounded hideous. I took the brief.

Luckily for me, there were lots of other counsel in the case who knew a lot about refugee law and policy, so I learned a lot.

It is not well-known that the trial judgment in the Tampa case was handed down at 2.15 pm, Melbourne time, on 11 September 2001. Eight or nine hours later the terrorist attack in America happened. So, we no longer had “boat-people”, we had “Muslim boat-people”. And suddenly, the Australian government began calling Muslim boat-people “illegals”, even though their entry into Australia is not a criminal offence. By doing the Tampa case, I learned a lot of uncomfortable truths about our law and policies regarding asylum seekers. Later, when the Immigration Minister was Scott Morrison, the entire exercise (punishing boat-people, sending them offshore, vilifying them) came to be called “border protection”.

The simple facts are that seeking asylum is not a crime, Australia does not need to be “protected” from people seeking asylum, and most of our federal Liberal politicians either do not know the facts, or they are liars.

After the Tampa case, I was asked to act for lots of asylum seekers. Finally, I was doing what Clarence Darrow would have done. One case, in particular, worried me – the case of Amin Mastipour. Amin arrived in Australia in March 2001 with his daughter Massoumeh. She was then five years old. They were held in Curtin for two years, then in Baxter. Baxter is surrounded by a 5,000-volt electric fence (although I was once publicly corrected by a senior official of the Immigration Department: it’s not an “electric fence”, it’s an “energised fence”).

On the 14 July 2003, three ACM guards entered Amin’s room in Baxter and ordered him to strip. Apparently, they thought he had a cigarette lighter.⁴ He refused, because, apart from it being deeply humiliating for a Muslim man to be naked in front of others, his (then) 7-year old daughter was in the room. When he refused to strip, the guards beat him up, handcuffed him, and took him to the “Management Unit”.

The Management Unit is a series of solitary confinement cells.

Officially, solitary confinement is not used in Australia’s detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a video tape of one of the Management Unit cells. It shows a

⁴ The following paragraphs were originally published as part of Julian Burnside, ‘Justice or Law?’ (Web Page, 8 December 2021) <<https://www.julianburnside.com.au/justice-or-law/>>.

cell about 3 ½ metres square, with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; but it is never dark. The occupant has nothing to read, no writing materials, no TV or radio – no company and yet no privacy, because a video camera observes and records everything, 24 hours a day. The detainee is kept in the cell 23 ½ hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky.

No court has found Amin guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

There he stayed from 14 July until 23 July – each 24 hours relieved only by a half-hour visit from his daughter, Massoumeh. But on 23 July she did not come. It was explained to him that the manager of Baxter, Greg Wallace, had taken her shopping in Port Augusta.

But the next day, 24 July, she did not arrive for her visit – the manager came and explained that Massoumeh was back in Tehran. She had been removed from Australia under cover of a lie, without giving Amin the chance to say goodbye to her.

Amin remained in detention for another eight weeks. It took three applications in court to get him released. The government did not contradict the facts or try to explain why they had removed Massoumeh from the country; they argued simply that the court had no power to dictate how a person would be treated in detention. It sounds like the sort of argument the German government might have used in 1940 to justify Auschwitz.

The judge rejected the government's arguments and ordered that Amin be removed from solitary confinement and be moved to a different detention centre.⁵

The government appealed. It lost.⁶

This is our taxes at work: tormenting innocent people, in ways that offend every decent instinct – and for what? To deter people smugglers? The HREOC report into Children in Detention concluded that the treatment of children in Australia's detention centres was "cruel, inhumane and degrading", and that it constituted systematic child abuse. The

⁵ *Mastipour v Department of Immigration & Multicultural & Indigenous Affairs* [2003] FCA 952.

⁶ *Mastipour v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 137; *Department of Immigration & Multicultural & Indigenous Affairs v Mastipour* (2004) 259 FCR 576.

Minister did not seek to deny the facts or the findings; instead, she said simply that it was “necessary”, that the alternative would “send a green light to people smugglers”.

Amin got a protection visa. He shows all the signs of serious damage from years in detention.

IV FIRST AUSTRALIANS

Probably because of my work for refugees, I was briefed to act in a case in the SA Supreme Court for a bloke called Bruce Trevorrow.⁷ In my opinion, it was probably the most important case I ever did. In the South Australian case, the Plaintiff was Bruce Trevorrow. Bruce was the illegitimate son of Joe Trevorrow and Thora Lampard. They lived at One Mile Camp, Meningie, on the Coorong in South Australia. It is the centre of the Ngarrandjeri people. Meningie’s population now is about 1,800.

One Mile Camp was a collection of tents and humpies, a mile away from Meningie.

Joe Trevorrow and Thora Lampard had two other sons, Tom and George Trevorrow.

They lived at One Mile Camp because, when Bruce was born in November 1956 it was not lawful for an aborigine to live closer than one mile to a place of white settlement, unless they had a permit. How extraordinary is that? Aboriginal people have lived here for about 65,000 years. White people turned up and took over the place about 250 years ago, and we made a law like that!

When Bruce was 13 months old, he got gastroenteritis. Joe didn’t have a car capable of taking Bruce to the hospital, so some neighbours from Meningie took him to the Adelaide Children’s Hospital (about an hour’s drive from Meningie) where he was admitted on Christmas Day 1957. Hospital records show that he was diagnosed with gastroenteritis, he was treated appropriately, and the gastro resolved within seven days. Seven days later he was given away to a white family who lived in suburban Adelaide.

They had a daughter who was aged about 16 at the time. She gave evidence at the trial as a woman in her late middle age. She remembered the day clearly. Her mother had always wanted a second daughter. They had seen an advertisement in the local newspaper offering Aboriginal babies for fostering. They went to the hospital and looked at a number

⁷ The following paragraphs are adapted from Julian Burnside, ‘The Stolen Generations’ (Web Page, 20 June 2019) <<https://www.julianburnside.com.au/the-stolen-generations/>>.

of eligible babies and saw a cute little girl with curly hair and chose her. They took her home and when they changed her nappy they discovered she was a boy. Such was the informality with which Aboriginal babies could be given away in early 1958 in South Australia.

A short time later, Bruce's mother wrote to the Department asking how he was doing and when he was coming home. The magnitude of her task should not be overlooked: Pen and paper, envelope and stamp were not items readily obtained in the tin and sackcloth humpies of One Mile Camp, Meningie. But Thora managed to write a letter which still exists in the State archives. The reply is still in existence. It notes that Bruce is doing quite well but that the doctors say he is not yet well enough to come home. Bruce had been given away weeks earlier.

The laws relating to fostering required that foster mothers be assessed for suitability and that the foster child and foster home should be inspected regularly. Although the laws did not distinguish between white children and Aboriginal children, the fact is that Bruce's foster family was never checked for suitability, and neither was he checked by the Department to assess his progress. He came to the attention of the Children's Hospital again when he was three years old – he was pulling his own hair out. When he was eight or nine years old, he was seen a number of times by the Child Guidance Clinic and was diagnosed as profoundly anxious and depressed, and as having no sense of his own identity.

Nothing had been done to prepare the foster family for the challenges associated with fostering a young Aboriginal child. When Bruce was 10 years old, he met his natural mother for the first time. Although the Department had previously prevented his mother from finding out where Bruce was, the law had changed in the meantime, and they could no longer prevent the mother from seeing him.

The initial meeting interested Bruce and he was later to be sent down to stay with his natural family for a short holiday. When the welfare worker put him on the bus to send him down to Victor Harbour, the foster mother said that she couldn't cope with him and did not want him back. His clothes and toys were posted on after him.

Nothing had been done to prepare Bruce or his natural family for the realities of meeting again after nine years. Things went badly and Bruce ended up spending the next six or

eight years of his life in State care. By the time he left State care at age 18, he was an alcoholic. The next 30 years of his life were characteristic of someone who is profoundly depressed and who uses alcohol as a way of shielding himself from life's realities. He has had regular bouts of unemployment and a number of convictions for low-level criminal offences. Every time he has been assessed by a psychiatrist, the diagnosis has been the same: anxiety, profound depression, no sense of identity and no sense of belonging anywhere.

The trial had many striking features. One was the astonishing difference between Bruce – profoundly damaged, depressed and broken – and his brothers, who had not been removed. They told of growing up with Joe Trevorrow, who taught them how to track and hunt, how to use plants for medicine, how to fish. He impressed on them the need for proper schooling. They spoke of growing up in physically wretched circumstances but loved and valued and supported. They presented as strong, resilient, resourceful people. Their arrival to give evidence at the trial was delayed because they had been overseas attending an international meeting concerning the repatriation of Indigenous remains.

The second striking feature was the fact that the Government of South Australia contested every point in the case. Nothing was too small to pass unchallenged. One of their big points was to assert that removing a child from his or her parents did no harm – they even ventured to suggest that removal had been beneficial for Bruce. This contest led to one of the most significant findings in the case. Justice Gray said in his judgment:

I find that it was reasonably foreseeable that the separation of a 13 month old Aboriginal child from his natural mother and family and the placement of that child in a non-indigenous family for long-term fostering created real risks to the child's health. The State through its emanations, departments and departmental officers either foresaw these risks or ought to have foreseen these risks.⁸

That finding also accords with common sense. We all have an instinct that it is harmful to children to remove them from their parents. It was based on extensive evidence concerning the work of John Bowlby in the early 1950s, which showed that it is

⁸ *Trevorrow v South Australia* (2007) 98 SASR 136, 319 [885].

intrinsically harmful to remove a child from his or her parents, in particular when this occurs after nine months of age.

The harm of which the Prime Minister spoke when he said 'sorry' was harm which Governments knew in advance would result from their conduct.

At the time Bruce was removed, the Aborigines Protection Board of South Australia had already been advised by the Crown Solicitor that it had no legal power to remove Aboriginal children from their parents. One of the documents tendered at the trial was a letter written by the secretary of the APB in 1958. It read in part:

... Again in confidence, for some years without legal authority, the Board have taken charge of many aboriginal children, some are placed in Aboriginal Institutions, which by the way I very much dislike, and others are placed with foster parents, all at the cost of the Board. At the present time I think there are approximately 300 children so placed. ...⁹

After a hard-fought trial, the Judge found in Bruce's favour, and awarded him a total of \$800,000 plus costs.

There are a few things to say about this. First, Bruce's circumstances are not unique. There are, inevitably, other Aboriginal men and women who were taken in equivalent circumstances while they were children, and suffered as a result. Although they may seek to vindicate their rights, the task becomes more difficult as each year passes. Evidence degrades, witnesses die, documents disappear.

Second, litigation against a government is not for the fainthearted. Governments fight hard. It took Bruce's case eight years to get to court, and the trial ran from November 2005 to April 2006. If he had lost the case, Bruce would have been ruined by an order to pay the government's legal costs.

The third thing to note about Bruce's case is that the same facts would not necessarily have produced the same result in other States. The legislation concerning Aborigines was not uniform in all the States and Territories.

The Prime Minister's apology makes no difference whatever to whether or not governments face legal liability for removing Aboriginal children. But it acknowledges

⁹ *Trevorrow v South Australia* (2007) 98 SASR 136, 167 [74].

for the first time that a great moral wrong was done, and it acknowledges the damage which that caused. The most elementary instinct for justice tells us that when harm is inflicted by acts which are morally wrong, then there is a moral, if not a legal, responsibility to answer for the damage caused. To acknowledge the wrong and the damage, and to deny compensation is simply unjust.

From this point, events can play out in a couple of different ways. One possibility is that members of the Stolen Generations will bring legal proceedings in various jurisdictions. Those proceedings will occupy lawyers and courts for years and will run according to the circumstances of the case and the accident of which State or Territory is involved. The worst outcome will be that some plaintiffs will end up the way Lorna Cubillo and Peter Gunner ended up eight years ago: crushed and humiliated. Or they might succeed, as Bruce Trevor did. Either way, it is a very expensive exercise for the State, and a gruelling experience for the plaintiff.

A second possibility is a national compensation scheme, run by the States, Territories and the Commonwealth in co-operation. The scheme I advocate would allow people to register their claim to be members of the Stolen Generations. If that claim was, on its face, correct, then they would be entitled to receive copies of all relevant Government records. A panel would then assess which of the following categories best describe the claimant:

- (a) removed for demonstrably good welfare reasons;
- (b) removed with the informed consent of the parents;
- (c) removed without welfare justification but survived and flourished;
- (d) removed without welfare justification but did not flourish.

The first and second categories might receive nominal or no compensation. The third category should receive modest compensation, say \$5,000-\$25,000, depending on circumstances. The fourth category should receive substantial compensation, between say \$25,000-\$75,000, depending on circumstances.

The process should be simple, co-operative, lawyer-free, and should run in a way consistent with its benevolent objectives.

If only the Governments of Australia could see their way clear to implement a scheme like this, the original owners of this land would receive real justice in compensation for one of the most wretched chapters in our history.

Until such a scheme is introduced, members of the Stolen Generations will have good reason to think that they have been denied justice.

We got judgment in Bruce's case in August 2007. Later that year, Kevin Rudd was voted in as the new PM of Australia. He announced that the first business of the new Parliament would be an apology to the Stolen Generations. He wanted plenty of people in the public gallery of the House of Representatives to hear the apology. By this time, Tom & George Trevorrow had become leaders of the Ngarrindjeri people.

Tom & George Trevorrow were invited to hear the apology. Bruce was not. We sent the Department a note, and Bruce was then invited. He got there and was very proud of the fact.

It was astonishing and uplifting to hear some of the noblest and most dignified sentiments ever uttered in that place on the hill. It is worth recalling some of the words:

... today we honour the indigenous peoples of this land, the oldest continuing cultures in human history.

We reflect on their past mistreatment.

We reflect in particular on the mistreatment of those who were Stolen Generations – this blemished chapter in our nation's history. ...

We apologise for the laws and policies of successive Parliaments and Governments that have inflicted profound grief, suffering and loss on these our fellow Australians.

...

For the pain, suffering and hurt of these stolen generations, their descendants and for their families left behind, we say sorry.

To the mothers and the fathers, the brothers, and the sisters, for the breaking up of families and communities, we say sorry.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry. ...

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.

A future where this Parliament resolves that the injustices of the past must never, never happen again. ...¹⁰

The 13 February 2008 will be remembered as a day the nation shifted, perceptibly. The apology was significant not only for marking a significant step in the process of reconciling ourselves with our past: it cast a new light on the former government. It set a new tone. And I think it reminded us of something we had lost: a sense of decency.

Most of the worst aspects of the Howard years can be explained by the lack of decency which infected their approach to government. They could not acknowledge the wrong that was done to the Stolen Generations; they failed to help David Hicks when it was a moral imperative – they waited until his rescue became a political imperative; they never quite understood the wickedness of imprisoning children who were fleeing persecution; they abandoned ministerial responsibility; they attacked the courts scandalously but unblushing; they argued for the right to detain innocent people for life; they introduced laws which prevent fair trials; they bribed the impoverished Republic of Nauru to warehouse refugees for us. It seemed that they did not understand just how badly they were behaving, or perhaps they just did not care.

One of the most compelling things about the apology to the Stolen Generations was that it was so decent. Suddenly, a dreadful episode in our history was acknowledged for what it was.

Unfortunately, when announcing that the Government would apologize to the Stolen Generations, the PM also said that the Government would not offer compensation.

Bruce died on 20 June 2008, aged just 51.

V CONCLUDING REMARKS

I am glad I was able to do the case of *MUA v Patrick Stevedores*. I am glad I was able to do the Tampa case. I was glad of the opportunity to act for Amin Mastipour and many other asylum seekers.

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister). See especially, *Apology to Australia's Indigenous Peoples*, 2008, Gemma Black (calligrapher), Gifts Collection, Parliament House Art Collection
<https://www.aph.gov.au/Visit_Parliament/Art/Exhibitions/Custom_Media/Apology_to_Australias_Indigenous_Peoples>.

But I am especially proud of having acted for Bruce Trevorrow. His case was the first (and arguably the only) case in which an Aboriginal was found to have been taken from his family illegally, and to recover damages as a consequence.

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