

**CUBILLO V COMMONWEALTH OF AUSTRALIA
GUNNER V COMMONWEALTH OF AUSTRALIA**

(THE 'STOLEN GENERATIONS' CASE)

COMMONWEALTH OPENING SUBMISSION



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1 INTRODUCTION

1.01 The case made against the Respondent is that, between 1946 and 1964, it, or public officers of the Respondent, engaged in the coercive removal of children with the objective of destroying aboriginal heritage, displacing it with what is variously described as a 'European' or 'white' heritage.

1.02 The Respondent denies that in the period 1946-1966:

1.02.01 a policy was formulated and applied to effect the destruction of a person's heritage;

1.02.02 a policy was formulated and applied for the coercive removal of children, save where the child was neglected or its life was at risk.

1.03 The Respondent says:

1.03.01 that until about 1938 it applied a policy of separation and protection of aboriginals on aboriginal reserves;

1.03.02 that it then adopted, for many aboriginals, a policy of assimilation as advocated by Professor Elkin;

1.03.03 that the adoption of the policy was a reaction to social change of many aboriginals then taking place;

1.03.04 that the social change was not initiated or driven by any policy of the respondent;

1.03.05 that the assimilation policy was intended to, and did, alleviate or minimise undesirable consequences flowing from the social change;

1.03.06 that the objective of the assimilation policy was to give to those experiencing the social change an equal opportunity

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- to other Australians to participate in the community as equals, without social, racial or intellectual stigma;
- 1.03.07 that an important step in the achievement of that objective was the provision of a public education for children, being the same or similar education provided to other Australian children;
- 1.03.08 that at the time the educational services in the Northern Territory were under-developed, so that the number of schools were few and the receipt of a public education necessitated either accommodation in the principal towns or the awaiting of the development of schools and the provision of teachers in remote areas;
- 1.03.09 that it was perceived that children who were not of full blood aboriginal parentage, and who had been abandoned by their non-aboriginal fathers, were at risk (physically, morally and/or intellectually) if left in aboriginal camps; it was perceived that such children were at risk in long term of exploitation in employment especially in remote stations and of sexual exploitation and abuse; that by reason of their parentage they were likely to respond positively to and benefit from a public education at a school attended by other Australian children without discrimination as to colour or race; that this should be done where the mother's of such children consented to them being admitted to hostels at the principal towns where such schools were to be found;
- 1.03.10 that where the children enjoyed both parents, albeit of different races, it was perceived that the presence of both parents lessened or removed the risks that otherwise were feared may exist; that in the case of such children it was

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expected the parents would make arrangements for their schooling in the public schools in accordance with the policies of compulsory universal schooling adopted throughout the Commonwealth;

1.03.11 that it was perceived that where the child enjoyed full aboriginal parentage, it was unlikely such a child was at risk in a physical or moral sense, that it was unlikely such a child would benefit from admission to a public school without extensive educational preparation, and that in such cases special schools should be (and were) established at stations and indigenous reserves for their education.

1.04 As to these policies, the Respondent says:

1.04.01 their formulation was and is the exclusive task of government, comprising the executive and the legislature, but not the judiciary;

1.04.02 the policies were adopted by the executive government and were endorsed by the relevant legislature (being the Northern Territory Legislative Council);

1.04.03 the implementation of the policies was dependent upon the availability of resources, including financial resources and the priorities of the executive government (as approved by Parliament through the budgetary process), which matters fall outside the powers of the judiciary to determine adequacy or propriety and in any event, would impose an impossible task where the policies were formulated between 45-65 years ago;

1.04.04 that even if the court did have jurisdiction to review such policies and the adequacy of resources for their implementation, the Respondent is prejudiced by the loss

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of critical witnesses (being those responsible for their formulation and implementation) so that fair trial of those issues could not now take place.

1.05 The Respondent says that to the extent that complaint is made of the application of such policies to individual cases, such as these Applicants:

- 1.05.01 the application to individuals was entrusted to public officers, being the Directors of Native Affairs or Welfare;
- 1.05.02 that entrustment was by legislative enactments of the Northern Territory Legislative Council;
- 1.05.03 that the Legislative Council was not the agent or delegate of the Respondent but was a sovereign legislature enjoying plenary powers to the extent of their grant;
- 1.05.04 the legislative enactments empowered the Directors to implement the policies formulated by the Respondent by granting discretionary statutory powers that were not subject to direction by the Respondent;
- 1.05.05 that the Directors did not act wrongfully in the exercise of those powers so far as they were exercised (if at all) against the Applicants (a defence which is prejudiced irretrievably by the loss of relevant witnesses and some documents lost by the ravages of war, cyclones and time);
- 1.05.06 that if contrary to this, the powers were exercised against the Applicants, and wrongfully, or inappropriately, there is no civil liability by the Directors to compensate for the wrongful or inappropriate conduct; and

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- 1.05.07 even if the Directors were liable to compensate, there is no vicarious liability of the Respondent that can arise in consequence.
- 1.06 The Respondent contests a number of the allegations as to fact made by the Applicants where they complain of suffering loss or abuse:
- 1.06.01 in the case of Cubillo, the Applicant does not concede that she was removed to Retta Dixon Home pursuant to the exercise of statutory coercive power, observing that so far as can be known after such passage of time, her removal was consistent being an orphan and being taken to a missionary institution which took in orphans, quite possibly only through the actions of missionary staff and not by anyone exercising statutory powers;
- 1.06.02 in the case of Gunner, the Applicant does not concede removal pursuant to the exercise of coercive statutory power, observing that his removal was consistent with a request of his mother to the Director that he take responsibility for the care and education of Gunner;
- 1.06.03 the Respondent does not concede the Applicants were ill-treated whilst in care of the hostels; their allegations of specific ill-treatment are denied; the Applicant does not concede that the standard of care and education was inappropriate or deficient and says it was the education delivered to all Australian children at that time;
- 1.06.04 the Respondent says that their acceptance into the hostels, being aboriginal institutions, was by statute a placement of them into the care of and control by the Superintendents of those institutions;

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- 1.06.05 the Respondent says that the hostels into which they were placed were not its institutions; they were not established or run by the Respondent but by the missionary arms of their respective churches; they were not staffed by government employees but by missionary employees; should any actionable misconduct by persons at those homes be established, that does not permit an order for compensation against it; and
- 1.06.06 in respect of these allegations, too many years have passed, too many have died, to allow a fair trial of such matters to take place.
- 1.07 The Respondent says these applications are misconceived in law, there being pleaded many causes of action not known to the law, and where they are known, are barred by statutory limitations. The limitation periods expired 45 and 35 years ago. There is no judicial discretion to extend time, in that the Applicants cannot prove any of the conditions that must be proved before the court is empowered with such a discretion. Even if that hurdle was overcome, the court could not exercise its discretion in their favour because they cannot demonstrate that a fair trial of the matter can take place. That is because there can be no doubt that by the passage of time the Respondent is severely prejudiced in defending the issues of fact raised in these matters.
- 1.08 Each of these defences will be addressed. Since the Respondent is deprived of so many crucial witnesses, and has been so deprived for many years before these actions were mooted, the Respondent cannot address by reference to proofs of such people. That creates a difficulty which the Respondent overcomes as follows:
- 1.08.01 reference will be made, where they exist, to writings and publications of the deceased so as to draw attention to

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what they have said in the past. By that means the Respondent will establish the significance of their loss.

1.08.02 the existence of such writings has not been found in respect of more than a few of the deceased. For most there are no writings, and so no possibility of the Respondent demonstrating by that technique what they would have been likely to say.

1.08.03 where writings exist, it must be understood that the deceased were not addressing these statements of claim, though there may be some coincidence between the matters they did address with the allegations now made.

1.08.04 in all cases the Respondent is denied the advantage of the sworn evidence of these people, and denied the opportunity to present these people for cross-examination so as to compel the putting of the allegations of misconduct and allowing the court to hear and assess the strength of their rejection.

1.08.05 in all cases the Respondent is denied information and, perhaps, evidence, of matters the memory of which has been lost with their death.

2 GENERAL WELFARE POLICIES

2.01 The policies relating to illegitimate half caste children can be assessed only against the backdrop of the welfare policies relating generally to aboriginals, and the development of those policies.

2.02 *History of Development of Policies*

The history of native administration falls into three periods.

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- 2.02.01 There was a brief period at the time of first settlement when the Aboriginal inhabitants were regarded as having equality before the law with other British subjects, and when the missionary purpose was to bring to them civilisation and Christianity.
- 2.02.02 After the inevitable clashes which followed expansion into tribal lands, and failure of the missionaries, there was a longer period where the aboriginals were regarded as being of a special class, neither amenable to the law nor in practice able to enjoy the equality accorded to them by British theory and Christian faith. Administration during this period was based on the idea of protecting them from the harmful effects of white settlement by placing them in reservations and making special laws and regulations. White perception was that the Aboriginals could not look after themselves and earn a living in the normal way, so measures were taken to protect them from injury - but on a lower scale than for the rest of the community. This led to neglect for the aboriginals, due largely to the idea that they would die out. No hope for the future was offered.
- 2.02.03 During the first half of this century that slowly gave way to a third period where the idea of protection yielded to the advancement of social welfare to allow them to live the best life of which they were capable and to take their place in the Australian community. That change became evident at a 1938 Commonwealth conference, and progressed much further at a 1951 Conference. It was known as a policy of assimilation.
- 2.02.04 In none of these periods was there a Government objective to wipe out aboriginal heritage. To the contrary, the

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desire was to retain it - but there was despair at success, and a belief that it would inevitably fade away.

2.03 *Significance of Hasluck*

2.03.01 The most significant person who contributed to, and could speak about, the transition from a policy of protection to a policy of assimilation would have been Sir Paul Hasluck. He was the Minister responsible for Commonwealth policy in the area from 1951 to 1963. But his influence was over a much longer period, and a much broader spectrum of Government, than that. During the 1920's and 1930's whilst a journalist he took a keen interest in aboriginal matters in Western Australia, though not limited just to that State. He wrote in newspapers and published books. He completed a thesis for a Masters Postgraduate degree under Professor's Elkin's supervision. Professor Elkin was the foremost anthropologist of the period, and had a like and immense influence on the development of welfare policy. Sir Paul entered politics and quickly became a Minister with responsibilities in this area. He did not remain in an office in Canberra, but was out and about the Territory. Nor did he limit his influence just to the Territory but extended it to the whole of Australia. He convened regular national conferences of all responsible Ministers, pressed for the acceptance of his policies, and undertook their philosophical justification. He was a man of immense integrity and great prestige, later becoming Governor-General of Australia.

2.03.02 The Court is referred to his own writings as to his background. He wrote and published an autobiography entitled "Mucking About". Chapter 17 of that book set out

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his experiences with the Aborigines. If regard is had to it, it will be seen that here we find a man who took not merely an academic interest in the aborigines, but had extensive personal knowledge of them and their plight. It may be noted that his concerns were not merely about the full-bloods, but the half castes as well, whose position he regarded as especially difficult. He studied under Professor Elkin, who acclaimed his Master's thesis.

[Chapter 17 "Mucking About"]

- 2.03.03 Sir Paul Hasluck entered Parliament after the War and was soon advocating the Aboriginal cause. Reference will be made to what he said in Parliament, which generally is not permissible because of section 16 *Parliamentary Privileges Act 1987*. It is no impediment to the speeches to which reference is made, for in 1953 Sir Paul Hasluck caused his speeches to be published.

It will be noted that this speech was in support of a private motion calling for national leadership by the Commonwealth to press for the adoption of policies of assimilation. The motion was passed unanimously.

[Hasluck Speech as Backbencher 8/6/1950: A National Problem]

- 2.03.04 In April 1951 Sir Paul Hasluck became Minister of Territories and proceeded to put his ideas into practice by calling the first national Native Welfare Conference. That brought together the representatives of all of the State Aboriginal Welfare Agencies as well as the Commonwealth. He reported to Parliament on its outcome. In this speech he set out his understanding of

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the history of aboriginal welfare and his explanation and justification of the assimilation policy which the national conference had endorsed.

[Hasluck Speech as Minister 18/10/1951: The Native Welfare Conference]

- 2.03.05 In 1952 Sir Paul Hasluck caused a draft of the Welfare Ordinance to be drafted and sent it to the Territory for consideration by the Legislative Council. A second Native Welfare Conference was held that year, and he addressed it on his legislative proposals. The speech is important because it identifies the purposes underlying his legislative initiatives and gives the lie to the allegation that the respondent had adopted or was adopting policies which had as their objective the destruction of aboriginal heritage. In addition, the speech traversed educational policies then being pursued, and the reason for them.

[Hasluck Speech as Minister 29/9/1952: The Record in the Northern Territory]

- 2.03.06 Shortly afterwards he spoke to the Biennial Conference of the Australian National Council of Women in Melbourne. He described the progression from protection to welfare, and set out a philosophical justification for what was being done. The speech is important in this respect as it identifies what he saw as the alternatives which were, to him, unacceptable. Those unacceptable alternatives included what was known in South Africa as apartheid, and in India as the caste system.

[Hasluck Speech as Minister 14/10/1952: From Protection to Welfare]

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2.03.07 The final speech to which reference is made is one which was made earlier that year to those interested in Anthropology at the 29th Meeting of the ANZAAS conference. In this speech he advanced his understanding of the inevitability of social change that was taking place amongst aboriginals, a change not caused by Government but which must be recognised and accommodated.

[Hasluck Speech as Minister 22/8/1952: The Future of the Australian Aborigine]

2.03.08 Before examining Ministerial directives emanating from him, attention is drawn to his willingness to defend what had been done as the correct policy, and to remonstrate with those who misconceived its nature. That is done to draw attention to the serious prejudice suffered in not having available such a witness, and to illustrate the extent to which, at least in his view, the policies were misrepresented. The first document is short, being a letter he wrote in 1957 upon reading a doctoral thesis that had been prepared by someone. The second is much later, being from his book written in 1988 concerning aboriginal affairs from 1925-1965. In the course of his book he points out that policies are not static, they change with the times. Attention should be paid to the varying factors which he notes.

[Hasluck to Sir Keith Hancock, ANU 13/8/1957]

[Hasluck, *Shades of Darkness*, 1988 Chapter 4 “A Policy of Assimilation”, Chapter 5 “The Hiatus in Wartime”, Chapter 6 “I Become Minister of Territories”]

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- 2.03.09 It can be seen that Sir Paul Hasluck certainly played a very active role, just from these references. There are more to which reference could be made. Other chapters in his books, other letters and other speeches. He was a prolific writer. But, unfortunately, he is dead. He died on 9 January 1993.
- 2.03.10 There were other Ministers who preceded him, who have not recorded their accounts, but by whose office would have been well qualified to give an account of the development of welfare policies and their purposes. So too were there Departmental Secretaries, all of whom but especially they who served Sir Paul Hasluck would have been qualified to speak of the same matters. So, too, the Administrators who served in the period 1937-1964. They are all dead.
- [List of Deceased Ministers, Secretaries and Administrators 1937-1964]
- 2.03.11 This matters to the conduct of these trials. The Applicants attack the purpose and object of the welfare policies, especially that of assimilation. Presumably they say or will say that one cannot take at its face value that which was so often spoken by Sir Paul Hasluck, or perhaps if they spare him, they say his views were not those held by the others. The respondent is denied the opportunity to call Sir Paul Hasluck to the witness box and have affirm those policies and their true purpose. It is denied the opportunity to ask him what he says of the allegations made by the Applicants, and have his answer brought to account in determination of those issues. It is denied in like measure the evidence of the other Ministers,

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the Departmental Secretaries and the Administrators of the Territory.

2.04 *Constitutional Development in NT*

2.04.01 The Court will now be referred to the evidence of acceptance of the policy of assimilation, and the interpretation of that policy in the official documents of the Territory. Before doing so, it is necessary to examine the constitutional status of the territory at the relevant time, for the Applicants appear to assert it was but the agent of the Commonwealth. That was not so.

2.04.02 The Northern Territory was ‘accepted’ by the Commonwealth pursuant to provisions in the Australian Constitution through the medium of the *Northern Territory Acceptance Act 1910 (Clth)*.

[Book of Legislation relating to Northern Territory]

Note: this book should contain all of the legislation referred to in this section. Do not worry about the authorities.

2.04.03 The Governor-General was empowered “to make ordinances having the force of law in and in relation to the Territory” (subject to disallowance by the Commonwealth

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Parliament).¹ It was by the exercise of that power that the *Aboriginals Ordinance 1918 (NT)* was enacted.

2.04.04 In 1926 the North Australia Commission, a body corporate, was formed.² The Northern Territory was divided into North Australia and Central Australia. The Commission was empowered to make bylaws, subject to the approval of the Governor-General and not inconsistent with any Ordinance.³ The earlier ordinance making power was replaced by powers vested in the Governor-General to make ordinances in respect of each Territory.⁴

2.04.05 In 1931 the experiment of dividing the Territory into two parts was abandoned by the *Northern Territory (Administration) Act 1931 (Cwth)*. The law making powers were re-enacted, being vested in the Governor-

1 Section 13(1) *Northern Territory Acceptance Act 1910 (Clth)* which provided: “Until the Parliament makes other provision for the government of the Territory, the Governor-General may make Ordinances having the force of law in the Territory.”

By s.13(2) such Ordinances were to be laid before both Houses of Parliament and either House could disallow (by s.13(3)). This was a delegation of the Commonwealth legislative power, which is constitutionally permissible: *The Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

2 Section 6 *Northern Australia Act 1926 (Clth)*.

3 Section 19 *Northern Australia Act 1926 (Cwth)*.

4 For Northern Australia that was granted by s.59 *Northern Australia Act 1926 (Cwth)*.

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General⁵ for the whole Territory.⁶ The power remained so vested until after World War II.

2.04.06 The *Aboriginals Ordinance 1918 (NT)* was enacted during this time when the Ordinances were within the power of the Governor-General, acting with the advice of the Executive Council. The power of the Governor-General was a legislative power delegated by the Commonwealth Parliament. It had none of the qualities that were later, in 1947, to allow the legislative power of the Legislative Council to be characterised as a plenary power. Consequently, the Ordinances made by the Governor-General may be characterised, if it be useful, as delegated legislation of the Commonwealth Parliament (and thereby giving legislative effect to policies approved by the Commonwealth Government in 1918 and thereafter to 1947). It may be said, therefore, that during this time the legislative power was exercised as a delegate of the Commonwealth Parliament. Such a description, however, did not mean that the offices created under legislation such as the *Aboriginals Ordinance 1918 (NT)* (eg that of Chief Protector) were offices that were vested in the respondent, or that those holding the offices did so as delegates or agents of the respondent. Whether that was so depends upon the statutory provisions, for once the legislative power (albeit delegated) is exercised, it relies on the

5 Although this refers to the Governor-General in an unqualified way, by s.16A of the Acts Interpretation Act 101 such reference means the Governor-General “acting with the advice of the Executive Council”.

6 Section 6 *Northern Territory (Administration) Act 1931 (Cwth)*, introducing s.21 into *Northern Territory (Administration) Act 1910-1926 (Cwth)*.

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strength of the legislative arm of government, not the Executive.

2.04.07 In 1947 the *Northern Territory (Administration) Act 1947 (Cwth)* created a Legislative Council comprising a mix of appointees of the Governor-General on the advice of the Administrator, and elected members.⁷ The Legislative Council was empowered to “make Ordinances for the peace, order and good government of the Territory.”⁸ Assent was by the Administrator, who had power to reserve an Ordinance for the Governor-General.⁹ A power of disallowance was vested in the Governor-General.¹⁰ The Governor-General lost his Ordinance making capacity, and Ordinances made prior to the creation of the Legislative Council continued in force until amended or repealed by the Legislative Council.¹¹ Assent was given on 12 June 1947. It commenced on 16 October 1947.¹² The legislative power remained vested in that fashion until 1959, when by the *Northern Territory (Administration) Act 1959 (Cwth)*

7 Section 4 *Northern Territory (Administration) Act 1947 (Cwth)* introducing section 4B into the earlier Act.

8 Section 4 *Northern Territory (Administration) Act 1947 (Cwth)* introducing section 4U into the earlier Act.

9 Section 4 *Northern Territory (Administration) Act 1947 (Cwth)* introducing section 4V into the earlier Act.

10 Section 4 *Northern Territory (Administration) Act 1947 (Cwth)* introducing section 4W into the earlier Act.

11 Section 6 *Northern Territory (Administration) Act 1947 (Cwth)*.

12 Gazette 1947 p.2963.

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restrictions were introduced on the ordinances that could be reserved to and disallowed by the Governor-General.

- 2.04.08 The legislative body created in 1947, albeit with limitations on its law making power, was not a delegate or agent of the superior Commonwealth legislature as the Governor-General had been before it. It was a sovereign legislature with plenary powers, not a delegate or agent of the Commonwealth Parliament or of the respondent, but independent of them. Authorities supporting these propositions have been identified in the Respondent's submissions already filed.
- 2.04.09 This was notwithstanding that it was created by an Act of the Commonwealth Parliament. In 1885 the Privy Council in *Powell v Apollo Candle Company* observed that it was time to 'put an end to the doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial legislature. That has been applied in the Territory, denying that the Legislative Council (and the ordinances it passed) were in any way the work of an agent acting for the Respondent.
- 2.04.10 When the Legislative Council of the Northern Territory adopted a policy of assimilation by enactment of the *Welfare Ordinance 1953 (NT)* and the 1953 amendments to the *Aboriginals Ordinance 1918 (NT)*, directing the Director of Native Welfare and Director of Welfare to implement such policies, it did so as a sovereign legislature, not as agent of the respondent (even if, as was the case, it was actively encouraged to do so by the leadership of the Commonwealth Minister Hasluck). So too when enacting the *Child Welfare Ordinance 1958*

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(NT). The power of the Governor-General and the Administrator to delay, prevent or negative legislation by ordinance, or to encourage amendments, did not deny the plenary nature of the power. The Legislative Council adopted the earlier *Aboriginals Ordinance 1918 (NT)* and the offices it established, and created new offices of Director of Welfare and Director of Child Welfare, empowering the Directors, and imposing duties so as to provide legislative guidance and authority to them in the discharge of their duties.

2.04.11 It matters not that the Legislative Council comprised members only some of whom were elected, others being appointed by the Governor-General on the nomination of the Administrator. Nor that the appointees outnumbered those elected by 7 to 6. It was a legal entity constitutionally created by the Commonwealth Parliament and lawfully endowed with legislative power. Recognition of governmental status is not dependent upon the degree of acceptance of democracy. Even if there was a willingness by the Legislative Council to “rubber stamp” the Commonwealth Minister’s policies, it would not lessen its constitutional independence.

2.04.12 Sir Paul Hasluck caused a Welfare Ordinance Bill to be submitted to the Legislative Council. It did not survive in its original form, the debate often being highly acrimonious.

[Hansard of Debate in Northern Territory Legislative Council on the Welfare Bill]

2.04.13 Notwithstanding the debate, the Legislative Council endorsement in the Welfare Ordinance provisions the

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objective of assimilation. Bridge J in *Re Appeal by Arthur Dingle* (1962) 3 FLR 226 at 231:

“Clearly any matter now coming before the Administrator in Council under s.14(1) or this tribunal under s.36(1) on appeal should be determined in accordance with the policy suggested by the Ordinance in its present form and not as it stood before amendment. If this were not so that policy as one of progressive assimilation could be substantially defeated.”

2.05 *Acceptance and Implementation of Policy*

2.05.01 Sir Paul Hasluck in 1951 identified the commencement of the transition from a policy of protection to one of assimilation as having been tentatively accepted some 15 years earlier, which would be at the time or just after the 1937 Conference of Commonwealth and State Aboriginal Authorities (being the first of its kind). The resolutions of the conference reveal that the policy of assimilation was one more readily adopted for half castes than for full bloods, in respect of whom more investigation was thought desirable. In the course of examining these and later documents references will be seen to the half castes. Policies relating to them will be examined after the study of Aboriginal policy has been completed, for it can be understood only in the context of the larger policy.

[Report of 1937 Conference entitled Aboriginal Welfare pages 1-2]

2.05.02 That was quickly followed by an inspection of the provisions for Aboriginals in the Territory by the Minister for the Interior, McEwen. He issued a policy statement in February 1939. It will be observed that in the statement he spoke of the expectation of a transition from their

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nomadic to urban life. McEwen became leader of the Country Party/National Party, an eminent politician, but like others, has died (20/11/80). Evidence that he had conducted a personal tour of the Territory may be found in the 1938/1939 Report of the Administrator Abbott. Save for what inferences may be derived from that report, the evidentiary foundations for the policy he formulated, and its justification, are not matters on which the respondent can lead evidence from him.

[Commonwealth Government's Policy with respect to
Aboriginals February 1939]

[Annual Report of Administrator 1938-1939 page 28]

2.05.03 A consequence of the issue of the Policy Statement was the separation of the administration of Aboriginal Welfare from the Health Services. That led to the establishment of the Native Affairs Branch, the abolition of the office of Chief Protector and its replacement by a Director of Native Affairs, and the termination of Dr Cook's appointment. He was replaced by E.W.P. Chinnery, who had been the Director of District Services and Native Affairs in New Guinea, who took up his duties on 18 April 1939 and undertook investigations of native affairs. His report on problems relating to half castes will be referred to shortly. Evidence of these events is found in the same annual report of the Administrator.

[Annual Report of Administrator 1938-1939 page 23]

2.05.04 This marked a clear departure from the previous policies applied in the Territory, and is a reason why reference to earlier statements, especially by Dr Cook, give little

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guidance to what was adopted as policy from 1938 onwards. As will be seen shortly, policies as to half castes were carried through in some respects, but only because those had been like policies of assimilation adopted for them in advance of their application to Aboriginals generally.

- 2.05.05 McEwen did not remain Minister for long, being replaced by Senator Foll who held office from 26/4/1939 to 7/10/1941. He visited the Territory and gave instructions for the implementation of the 1938 policies. That is recorded in the next year's annual report of the Administrator. Senator Foll died on 7/7/1977.

[Annual Report of Administrator 1939-1940 page 17]

- 2.05.06 War broke out in 1939 and the nation's resources were diverted to and focussed upon defending Australia. So far as the aboriginals of the Territory were concerned, in 1942 many were evacuated to southern parts to avoid the bombing of the northern areas, and others came into contact and mixed with the great influx of servicemen from other parts of Australia, and from the United States. That had a profound effect on the nomadic life style of many aboriginals. More will be said about this shortly.

- 2.05.07 The Administrator did not submit reports for the 1941-1943 years, possibly because the emergency of war. The Administrator at this time was still Abbott, who had been the Minister responsible for the Territory in 1929, and its administrator since 1937. He died on 30/4/1975. His knowledge of the Territory must have been immense, including his knowledge of policies relating to Aboriginals. However, in his 1944 Annual Report whilst

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mentioning his long association with the Territory, he said nothing of aboriginal policies nor of aboriginal welfare, concentrating on a plea for statehood.

[Annual Report of Administrator 1943-1944 pages 1-9]

- 2.05.08 Abbott submitted his final report the following year. He pressed for the inauguration of a patrol officer system, responding to the advice to that effect by Chinnery who had experience of the patrol officer system in New Guinea. His report speaks of the Aborigines as a dwindling race, but not in consequence of Government policy. His comments reflect a kindly, perhaps a little patronising, attitude towards them, not one of destruction of them or their heritage.

[Annual Report of Administrator 1944-1945 pages 4-6]

- 2.05.09 Abbott was followed by Acting Administrator Giles, who submitted the annual report for the following year (1946). This is the year that Cubillo alleges she was taken into care, so the report relates a most relevant time. It was a time of post war reconstruction, in which the dominant concern in Aboriginal welfare was the fate of the aborigines employed by the services, and the repatriation of those who have been evacuated. There is not the slightest hint of a policy being applied to destroy aboriginal heritage, or to do harm to aborigines; the concern was entirely focussed upon their welfare. Reference is made to extracts from the Administrator's substantive report, and from Carrington's report (Carrington having succeeded Chinnery as Director) which was attached. Pride of the success of aboriginal artists is reflected in the report.

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[Annual Report of Administrator 1945-1946 pages 10, 14, 26-31]

- 2.05.10 In mid 1946 Mr Driver became Administrator and was to hold office for the next 5 years. He died on 18/5/1981. In his first report, for 1946-1947, he described the effect of the war on the administration of the Native Affairs Branch and the provision of welfare for aboriginals. He also referred to another conference that had taken place in Melbourne, chaired by Professor Elkin.

[Annual Report of Administrator 1946-1947 pages 14, 16]

- 2.05.11 A draft agenda survives of this conference, though to date the minutes have not been found. The agenda reflects the concern for aboriginal welfare. It may be noted that it addressed the employment of education to 'fit the aborigines into the white economy', but also identified 'aboriginal cultural aspects of education' as a matter of concern.

[Draft Agenda Conference of Senior officers 3/4 February 1947]

- 2.05.12 On 3 February 1948 a conference of senior Aboriginal Welfare Officers from all over Australia took place under the chairmanship of the Minister of Territories Johnson (who is now dead). An examination of the notes of the conference does not reveal any design on destruction of the aboriginal heritage. It does indicate an intention to further their welfare. Whilst all of these notes may be examined if necessary, it will suffice at this point to refer to what was said by the Minister and what was recorded in respect of education.

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[Notes of Conference at Canberra 3/2/1948 pages 1-2, 15-17]

2.05.13

[Documents evidencing acceptance of the policy - 1938 conference minutes, reports of the Administrators, reports of Directors. Passage of Welfare Ordinance and Wards Employment Ordinance. Keep this to memoranda relevant to general policy at this stage. Perhaps include Dr Wells' thesis]

2.06 Changing Circumstances.

[Demographic figures for Territory demonstrating numbers ceasing to be nomadic, increase in European population, increase in schooling (perhaps this may be left to a little later).]

2.07 Prohibition on Judicial Interference

"But when one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce. It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform another. One can readily understand that there may be disappointment in the performance by one branch or another of government of functions which are allocated to it under a division of powers. But it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected. Unless one observes the separation of powers and unless the courts are restricted to the application of the domestic law of this country, there would be a state of confusion and chaos which would be antipathetic not only to the aspirations of peace but to the aspirations of the enforcement of any human rights."

In the matter of Citizen Limbo (1989) 92 ALR 81 at 82-83 per Brennan CJ.

Structure of Opening

- 3.01 Anthropological & Other Reports on Half caste Adversity.
[Dr Maddocks report; selected other papers from policy analysis]
- 3.02 Removal of Aboriginal Status from Half Castes
[1953 policy initiatives]
- 3.03 Development of Half Caste Child Policies.
[Papers recording concern that removals be only with mother's consent; instructions issued]
- 3.04 Numbers Involved.
[Analysis of Half Caste homes; change from Government to Mission Institutions in 1940; War evacuation; Establishment of Retta Dixon and St Mary's; dual purposes of hostels (private and government inmates); nature of financial support of Commonwealth; figures]
- 3.05 Educational Development
[Dr Green's Report]
- 4 Cubillo Allegations.
[Liz Hollingworth to supply]
- 5 Gunner Allegations.
[Liz Hollingworth to supply]

Note: this is no more than a sketch with preliminary thoughts as to the materials upon which reliance may be placed. Each topic will need to be 'peppered' with the difficulty of proof after such a passage of time.

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Hasluck to Sir Keith Hancock, ANU 13/8/1957.	12
Hasluck, <i>Shades of Darkness</i> , 1988 Chapter 4 “A Policy of Assimilation”, Chapter 5 “The Hiatus in Wartime”, Chapter 6 “I Become Minister of Territories”. . .	12
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