

HOW SORRY ARE WE?

The limits of the Apology to the Stolen Generation

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The Australian government apology to the Stolen Generation was greeted with a collective sigh of relief when it was delivered in February 2008.

The refusal of the Howard government to say sorry on behalf of the nation for past policies of forced removals was an impasse in Aboriginal policy development. The Rudd government apology broke this impasse with a thoughtful and respectful expression of sorrow. However, the Rudd government apology failed to fully address the nature of the wrong inflicted on Aboriginal Australians through State and Commonwealth laws which allowed the forcible removal of Aboriginal children from their families.

The apology acknowledged that Commonwealth and State governments *should not* have implemented policies of removal. But it did not go the next step to acknowledge that the State *could not* implement these policies. This failure to recognise inherent limits to the law making power of the State reduced the scope of the apology. While the apology committed to addressing Aboriginal disadvantage for the future with ambitious targets in health, education and community development, it did not address the harm that removal policies inflicted on Aboriginal individual and collective identity. And while the apology recognised the pain and suffering of individuals, it did not commit to compensating them for the fact of being removed, or for the specific harm caused by their removal.

Without addressing the underlying questions about State power in relation to Aboriginal people, and responding with legal and policy changes which address the limits of this power, the spectre remains that policies which so flagrantly disregarded the fundamental rights of Aboriginal people could be repeated. The article demonstrates how the apology was limited in its terms, and outlines what is required of an apology to more fully address the wrongfulness of laws that empowered the State to remove Aboriginal children from their families.

The terms of the apology

The context in which the apology of the Rudd government to the Stolen Generation was delivered explains both its importance and the terms in which it was delivered. In 1995, the Keating Labor government commissioned the Human Rights and Equal Opportunity Commission ('HREOC') to inquire into the separation of Aboriginal and Torres Strait Islander children from their families. HREOC presented its findings to the Howard Coalition government in April 1997. Its report,

Bringing Them Home used empirical evidence and personal stories allegorically to present a devastating account of the impact and extent of policies of removal. The report recommended that the State respond to the policies of removal with five reparatory measures, the first of which was acknowledgement and apology. The other measures, which clearly were intended to flow from the apology, included a guarantee against repetition, measures of restitution, measures of rehabilitation, and monetary compensation.¹

In relation to an apology, the report recommended that:²

All Australian Parliaments

1. officially acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal,
2. negotiate with the Aboriginal and Torres Strait Islander Commission a form of words for official apologies to Indigenous individuals, families and communities and extend those apologies with wide and culturally appropriate publicity.

All State and Territory governments have passed motions of Apology in their respective Parliaments in fulfilment of this recommendation.³

The Coalition government's formal response to HREOC's report questioned the report's methodology and a number of its findings, and pursued its own response to policies of removal that were in line with its philosophy of 'practical reconciliation'. The Prime Minister John Howard expressly rejected the existence of 'intergenerational guilt'.⁴ On 26 August 1999, in response to mounting pressure to respond to the *Bringing Them Home Report* recommendation in relation to an apology, the Prime Minister made a statement to the Commonwealth Parliament titled 'Reconciliation between Aboriginal and non-Aboriginal Australians'. The statement reaffirmed a commitment to reconciliation, recognised the achievements of the nation in general, reaffirmed the importance of practical measures to address Aboriginal disadvantage, and acknowledged past mistreatment. Part of the statement was a careful set of words expressing regret, rather than sorrow in relation to policies of removal. It stated that:

[This House] expresses its deep and sincere regret that Indigenous Australians suffered injustices under the practices of past generations and for the hurt and trauma that many Indigenous people continue to feel as a consequence of those practices.⁵

REFERENCES

1. HREOC, *Bringing Them Home*, 282.
2. *Bringing Them Home*, Appendix 9, Recommendation 5a.
3. For a compilation of these apologies, see 'Stolen Generations: the Way Forward' (2009) 289 *Issues in Society*, 7.
4. Prime Minister, Mr Howard, Commonwealth Parliament, *Hansard*, 30 October 1996, 6158.
5. Commonwealth Parliament, House of Representatives, *Hansard*, 26 August 1999, 9165.

The failure of the Coalition government to unreservedly apologise in 1999 was considered a fundamental impediment to reconciliation during its time in office.

The apology to the Stolen Generations was the first piece of substantive business conducted in Parliament by the new Labor government. Members of the Stolen Generation and Aboriginal leaders from around the country attended Parliament to hear the apology, and Kevin Rudd greeted them all personally at its conclusion. The apology began with a call to reflection on 'the mistreatment of those who were the Stolen Generations.'⁶ This call to reflection was followed by a direct statement of apology for the consequences of the laws and policies of previous Australian governments that had led to this mistreatment. The Prime Minister said sorry for the pain, suffering and hurt caused to them by government policies, for breaking up families, and for the indignity policies of removal inflicted on Aboriginal people and their cultures. He said sorry on behalf of the government and on behalf of the Parliament.

The apology admitted that policies of removal were fundamentally wrong. In this sense, the apology reinforced the liberal values of the State. However, the apology avoided a consideration of the limits of the State's power by casting the policies as an historical injustice and personalising their impact: 'Some have asked, "Why apologise?" Let me begin to answer by telling the parliament just a little of one person's story.' This focus on personal stories, as moving and compelling as they were, meant the apology was able to avoid the full extent of the political impact of policies of removal, that is, their impact on the continuing existence and vitality of Aboriginal communities, their laws and customs, their language, their land ownership, and ultimately, their sovereignty.

In the speech, the Prime Minister took time to reflect on the scope of removal policies and their racist motivation. He pointed to the need to

acknowledge these facts if we are to deal once and for all with the argument that the policy of generic forced separation was somehow well motivated.... This is not, as some would argue, a black-arrmband view of history; it is just the truth: the cold, confronting, uncomfortable truth — facing it, dealing with it, moving on from it.⁷

Having confronted the uncomfortable truth of past wrongdoing, the apology established a path to resolving the historical injustice which was fully controlled by the government. It was the government which decided what we must do and when we must all move on.

At no point does the apology resile from the power of the State to enact laws of removal or its power to enforce them. In fact, the apology confirms the power of the State to pass the laws:

The uncomfortable truth for us all is that the Parliaments of the nation, individually and collectively, enacted statutes and delegated authority under those statutes that made the forced removal of children on racial grounds fully lawful.⁸

The apology was limited, therefore, to the consequences of the policies of removal. There was no reflection on the nature of government power or the extent of the State's sovereignty. These were assumed. The control the government maintained over the apology reinforced its claim to absolute sovereignty.

Key elements of a stronger Apology

There is a considerable and growing literature on the purpose of apologies. In recent apologies there is a greater degree of consciousness of the process of healing to which they contribute.⁹ An apology must offer victims 'a moral recognition or acknowledgement of their human worth and dignity'.¹⁰ They must 'acknowledge a wrong, admit guilt, take responsibility, and recognise suffering.' In addition, they must 're-establish trust ... and end cycles of resentment.'¹¹

Matt James has judged several apologies of the Canadian government against five requirements he argues are necessary for an authentic apology.¹² First, the wrong must be clearly named. In its apology, the Rudd government distinguished itself from the Howard government by accepting unequivocally that policies of removal were not well motivated. Second and third, the apology must take responsibility for the wrong and express regret. The Howard government expressed regret without taking responsibility. The Rudd apology did both. James' final two requirements for an authentic apology are that the apology must refrain from demanding forgiveness and must promise non-repetition. These last two characteristics of an apology are not fully present in the apology of the Rudd government to the Stolen Generations.

Risking rejection

An important characteristic of a real apology is that it may be rejected.¹³

Although apology calls for someone to issue it, until the individual to whom it is directed is willing to receive and accept it, apology remains incomplete... the fate of the apology and that of the one issuing the apology depends on the victim's willingness to accept it.¹⁴

To be genuine, an apology can place no expectation on the person or group who are the subjects of the apology to accept it.

The apology to the Stolen Generation carefully avoided the risk of rejection. The Prime Minister requested that the apology be accepted 'in the spirit in which it is offered as part of the healing of the nation'.¹⁵ The structure of the apology, as an official speech to the nation, did not allow for or require an acceptance. In fact, the only 'acceptance' officially recorded was that of the Opposition in the speech of Brendan Nelson:

We will be at our best today and every day if we pause to place ourselves in the shoes of others, imbued with the imaginative capacity to see this issue through their eyes with decency and respect.¹⁶

Although the public gallery was full of Aboriginal people witnessing the apology, the success of its delivery and

6. Kevin Rudd, 'Apology to Australia's Indigenous Peoples' *Hansard*, 13 February 2008, 167 ('Apology').

7. Apology, 169 and 170–1.

8. Apology, 170.

9. See generally, Gibney et al, *The Age of Apology* (2008).

10. Trudy Govier and Wilhelm Verwoerd (2002) 'The Practice of Public Apologies: A Qualified Defense' quoted in Janna Thompson, 'Apology, Justice, Respect' in Gibney et al, above n 9, 34.

11. Jean Marc Coicard and Jibecke Jonsson, 'Elements of a Road Map for a Politics of Apology' in Gibney et al, above n 9, 77.

12. Matt James, 'Wrestling with the Past: Apologies, Quasi-apologies and non-Apologies in Canada' in Gibney et al, above n 9, 138. The apologies James has judged against the five criteria included an apology to Japanese Canadians for their internment and treatment during WW II in September 1988; and a 'Statement of Reconciliation' to Canada's Aboriginal peoples in January 1998. The paper was written before the Harper apology was delivered in June 2008.

13. See, eg, Michael Freeman, 'Historical Injustice and Liberal Political Theory' in Gibney et al, above n 9 45; and Coicard and Jonsson, above n 11, 80.

14. Coicard and Jonsson, above n 11, 79.

15. Apology, 167.

16. Brendan Nelson, 'Apology to Australia's Indigenous Peoples' *Hansard*, 13 February 2008, 173.

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its acceptance did not depend on their presence. They were passive witnesses to the performance.

Risking rejection has direct implications for the sovereignty of the State. An apology is not complete without acceptance, and if it risks rejection, the State has no control over whether acceptance will be forthcoming. This is the high point of the State's vulnerability. Through making itself vulnerable, the State opens up the possibility for the development of trust. The State can only hope that Aboriginal Australians will accept the apology, and that the effort of making the apology will be worthwhile, but also that the relationship will survive rejection, should it occur. The hope is that trust will be engendered in the victim through the State's act of making itself vulnerable. Apologising is, then, a way of earning trust.¹⁷ Without making itself vulnerable in this way, the opportunity for a deeper trust with Aboriginal people is not realised.

Guaranteeing policies of removal will never happen again

The terms of the apology to the Stolen Generations accepted that the acts of violence under which removals took place were sanctioned by the law, albeit bad laws, but did not resile from the power of the law to commit these acts of violence.

[T]he government and parliaments of this nation must make this apology – because, put simply, the laws that our parliaments enacted made the stolen generations possible. We, the parliaments of the nation, are ultimately responsible, not those who gave effect to our laws. The problem is with the laws themselves.¹⁸

Although the Prime Minister acknowledges there was a problem with the content of the laws, he points to no limits on the power of the Parliament to pass them. It would seem then that the same laws could be passed again and that future apologies may be necessary. Here we encounter a paradox at the heart of sovereignty. The absolute sovereign cannot bind itself for the future. So the Prime Minister can only offer a pledge on behalf of his government that policies of removal must 'never, never happen again'.¹⁹ By failing to consider how such abuses can be guaranteed not to happen again, or even to explain what steps the government will take to prevent them in the future, the Prime Minister leaves open the possibility that they may be reproduced.

There is a strange dichotomy in the apology. It reveals a deep understanding of the horrors of past policies and that these horrors require us to 'wrestle with our soul'²⁰, but avoids the very questions that these horrors

and our psychological response to them should give rise. There is a genuine attempt at empathy in the apology: 'I know there is nothing I can say today that can take away the pain you have suffered personally'. But this empathy is simply a step on the path to moving on. In the same paragraph in which the Prime Minister asks us non-Aboriginal people 'to imagine if this had happened to you'²¹ he proposes that, 'if the apology we extend today is accepted in the spirit of reconciliation in which it is offered, we can today resolve together that there be a new beginning for Australia.' The new beginning is a point at which the pain in the present can be relegated to the past, if not forgotten altogether.

Of course, moving on to a new beginning where the past can be forgotten was the very point of the Rudd government apology. It was never intended to be a time for staying with the past. Historical injustice is capable of recognition on the condition that we do not stay there. The statement of apology was a political triumph for the Australian Labor Party and the Prime Minister Kevin Rudd himself. To be a moment of triumph, it had to be full of hope, full of the future, full of the possibility that the new government would make a difference.

The role of Aboriginal sovereignty

In a limited way, the apology acknowledged the separate political status of Aboriginal peoples. The apology is directed only to Aboriginal people and their families, and by implication acknowledges that what happened to them, even if it happened to others under different policies, was a unique harm. However, as discussed above, the recognition of a separate Aboriginal status within the apology is weakened by the fact that it does not countenance the power of Aboriginal people to reject its terms.

What makes an apology work is the exchange of power between the offender and the offended. By apologising you take the shame of your offence and redirect it to yourself. You admit of hurting and diminishing someone, and, in effect, say that you are really the one diminished.²²

Acknowledging the power of Aboriginal people to reject the apology is a way of recognising their sovereignty. By failing to countenance an exchange of power, the apology perpetuates the on-going official rejection of Aboriginal sovereignty.

Aboriginal sovereignty has two distinct meanings. First, it is a competing claim to legal authority in the Australian State. This is the sense of sovereignty used by Henry Reynolds and others to explain the

17. Pablo deGreiff, 'The Place of Apologies in National Reconciliation Processes' in Gibney et al, above n 9, 27. The State's vulnerability must, of course, be kept in perspective. The power imbalance between the State and Aboriginal people is far greater than between individuals, no matter what the status of their relationship, and the apology can only be directed to altering the balance of power in a peripheral way.

18. Apology, 170.

19. Apology, 167.

20. Apology, 170.

21. Apology, 170.

22. Aaron Lazare, 'Go Ahead, Say You're Sorry' (1995) 23 (1) *Psychology Today* 42; see also Lazare, *On Apology* (2004), 52.



23. See, eg. Henry Reynolds, *Aboriginal Sovereignty: Reflections on race, state and nation* (1996).

24. Larissa Behrendt, *Achieving Social Justice* (2003) 96. See also, Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307.

25. Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1, 9.

26. See, eg. Patrick Dodson, 'Lingiari: Until the Chains are Broken', in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation*, 269; Behrendt, above n 24.

27. See generally, Sean Brennan et al, *Treaty* (2005); Behrendt, above n 24.

28. On apologies to the Maori in New Zealand, see generally, Meredith Gibbs, 'Apology and Reconciliation in New Zealand's Treaty of Waitangi Settlement Process' in Gibney et al, above n 9 154-170.

true authority behind native title, and to argue that Aboriginal sovereignty supports other rights to self-government.²³ Second, as opposed to being a claim to Aboriginal legal and political power, sovereignty is a claim to be free of the legal and political power of others. In this sense, Aboriginal sovereignty is linked to Hobbes' idea that government only exists to preserve the autonomy of the individual. Along these lines, Larissa Behrendt has expressed the idea of Aboriginal sovereignty as a claim for 'the recognition of the uniqueness of individual identity and history'.²⁴ This second conception of Aboriginal sovereignty does not involve a *claim* to being unique. The uniqueness of Aboriginal identity and history is the *premise* of sovereignty. The claim is that the sovereignty of the State is inherently limited, and the very existence of Aboriginal communities with their own unique laws and customs is the primary evidence of this.

This second conception of Aboriginal sovereignty aligns with the work of many theorists on the limits of sovereignty. For example, Neil MacCormick argues that rather than there being a necessary and inevitable antagonism between different groups and their normative systems, and sovereignty having to be located within only one normative system, sovereignty is properly located in the interaction between systems.²⁵ For MacCormick, the tenuousness of locating sovereignty within one system is evident when that system is overstretched. Policies of removal are an example of sovereignty in Australia being overstretched, with fundamental questions about Aboriginal peoples, their community life and their social structures being made within an alien normative system.

In relation to the apology, the separate normative existence of Aboriginal peoples and their communities calls for a reconsideration of the assertion of absolute sovereignty which underpins both the policies of removal themselves and the Prime Minister's apology disavowing them. If the sovereignty of the State is understood as limited by Aboriginal sovereignty, this has direct ramifications for the government's response to laws and policies allowing for forced removals. In this regard, the apology was an opportunity to acknowledge and to begin to heed the calls of Aboriginal leaders and others who have advocated strongly for a guarantee of fundamental rights in the Commonwealth Constitution,²⁶ or for a Treaty between Aboriginal peoples and the government in Australia or even just proper involvement in policy development and implementation.²⁷

The form of a stronger Apology

What form would an apology take which recognised the inherent limits of State power? First, it is hard to see how it could be delivered to the nation from the dispatch box of the Federal Parliament. There is an interesting comparison to be drawn between the Australian Government apology and recent apologies to Maori tribes in New Zealand which were all delivered on Maori land or in the Maori parliament, once again reinforcing the separate political status of the victims.²⁸

Second, the apology would have been more cognisant of the need for acceptance and as a result would have paid greater attention to who it was being directed. Who is in a position to accept a State

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apology? Individuals? Communities? National leaders? The New Zealand example points to communities or tribal groups as the appropriate recipients. The Australian Government apology however focuses firmly on individuals and Aboriginal Australians as a whole. The apology draws on the individual story of Nanna Nungala Fejo but without identifying her tribal connection, and the apology was extended to victims of laws across the nation to people identified as 'Aboriginal' in a generic sense. The removal laws themselves made no distinction between tribal groups, and this blindness was a symptom of the mindset which allowed the State to ignore Aboriginal sovereignty in the first place. Identifying the impact on communities as well as individuals would have been a powerful way to recognise the foundation of Aboriginal difference. To the extent that Aboriginal people were provided with the agency to accept (or not) the apology, they remain an undifferentiated other. There was no recognition of cultural, language or political differences between Aboriginal communities. In fact, the apology reinforces the erasure of these differences.

Third, an apology which recognised the inherent limits of the State would allow space for a response, and would accept that the response might not be immediate, and when it comes, might not be positive. A response could only be heard, however, if there was a recognition that Aboriginal people, either nationally or at the community level, controlled the response. Such a recognition requires attributing agency to Aboriginal people. The apology cannot just be for what the State did. It must be for what the State did to *Aboriginal people*. The absence of Aboriginal agency in the apology is another indicator of the government's assumption of an absolute sovereignty over them.

Finally, an apology which recognised the inherent limits of the State would commit to providing compensation to those affected by the apology. Compensation is a tangible recognition that the government acted outside its power and injustice resulted. By uncoupling compensation from the particular harm suffered by individuals, as is required in common law claims before the courts, an apology acknowledges that the illegitimate exercise of power was a harm in itself. As Jeremy Waldron has pointed out in relation to reparations paid to Japanese American families as a result of their internment during World War II,

The point was not to make up for the loss of home, business, opportunity and standing in the community which people suffered at the hands of their fellow citizens,

nor was it to make up for the discomfort or degradation of their internment. ... The point was to mark — with something that counts in the United States — a clear recognition that this injustice did happen.²⁹

The existing mechanism for seeking compensation in the common law courts is inadequate for dealing with the compensation question. The abstract duties of care that exist at common law are not well suited to dealing with removal cases, the adversarial process is an inappropriate environment to relieve the pain of lives lost; and the structure of liability and damages at common law 'relies crudely, on predicting what would have happened in the normal course of events.'³⁰ Psychologically, common law cases pit the government against those bringing actions. The government is put in the position of defending its record, and denying its responsibility to the extent that this is legally possible. Raising such a defence is irreconcilable with the terms of an apology, even if the apology is only a recognition that the laws were ill-motivated and misconceived.

Conclusion

As welcome and moving as the Australian government apology to the Stolen Generation was, it remained limited in key respects. Until these limits are addressed, the government will face continuing criticism of the adequacy of its response to the suffering of Aboriginal children forcibly removed from their families and communities under State and Commonwealth laws. Furthermore, the limits to the apology are indicative of a conceptual problem which underpins Indigenous policy more generally and accounts for much of the continued criticism of the government's response to Indigenous issues in Australia.

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29. Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4, 6–7.

30. *Ibid.*, 8.