

PAST INJUSTICES AND FUTURE PROTECTIONS: ON THE POLITICS OF PROMISING

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On 13 February 2008, the Prime Minister of Australia, Kevin Rudd, delivered a long awaited apology to the Indigenous people of the country for past injustices. As the first gesture of its kind in the history of the national Parliament (and one stubbornly resisted by the previous Government), this exceptional political act was, from the very outset, destined to become a watershed moment, overburdened with expectations. Symbolically chosen as the first item of business in the first full parliamentary sitting of the newly elected Labor Government, the apology heralded a new era in Australian politics, marked first and foremost by a willingness to confront a troubled history. At the very heart of this attempt to come to terms with the past lay the heartbreaking story of the 'Stolen Generations', the Indigenous children removed from their families by various State and Territory governments over the course of the 20th century. In his address to the Parliament following the motion of apology, the Prime Minister spoke of the need to remember and repair this dark chapter in our history so that the nation could become a 'fully united and fully reconciled people'.¹ '[T]here comes a time in the history of nations', he declared,

when their peoples must become fully reconciled to their past if they are to go forward with confidence to embrace their future. Our nation, Australia, has reached such a time. That is why the parliament is today here assembled: to deal with this unfinished business of the nation, to remove a great stain from the nation's soul and, in a true spirit of reconciliation, to open a new chapter in the history of this great land, Australia.²

As the Prime Minister sought to underscore, this was not merely an occasion for 'sentimental reflection', but 'one of those rare moments in which we might just be able to transform the way in which the nation thinks about itself'.³

Clearly conscious of the momentous nature of the events over which he was presiding, Rudd shaped the apology as the definitive act of reconciliation, the gesture that would wipe the slate clean and finish the unfinished. Making liberal use of the metaphors of the 'new chapter' and the 'new page', his address to the Parliament made it abundantly clear that the real purpose of the day was not to dwell upon the past (and perhaps not even to do it justice)⁴ but to reconcile discordant parties and create new futures. Inserted into the gap between the past and the future or, as Andrew Schaap has put it, 'between the memory of offence and anticipation of community',⁵ the apology was self-consciously styled as a point of origin for the community of equals based on 'mutual respect' that was yet to come. As Rudd saw fit to remind his audience again and again, the apology represented a bold new departure in the story of the nation, an event to bring 'the first two centuries of our settled history to a close'⁶ and to begin something new. In the motion put to the House, this intention to mark 'a new beginning'⁷ found its pivot point in the resolution that 'the injustices of the past must never, never happen again'.⁸ Implicitly, if not explicitly, protection against racial discrimination was set down as the foundation stone of the newly constituted nation and the basis for 'moving forward with confidence to the future'.⁹

Exactly how much confidence can be placed in the apology and the new, more inclusive Australia it called forth from the future is, however, still uncertain. In what follows, I will suggest that this uncertainty derives from two primary sources: firstly, from the failure of the Government to make the kind of reparations needed to demonstrate the sincerity of the apology and, secondly, from a more deep-seated problem (one that the apology itself exposed) relating to the unpredictability or, as Hannah Arendt put it, the 'frailty' of political action.¹⁰ As I will attempt to show, the promise of

the apology, understood both in terms of the undertakings it made to Indigenous people and the hope it carried for reconciliation, was conditioned or overdetermined by two quite different, and potentially discordant, forms of recognition. On the one hand, the recognition of suffering, of the pain inflicted upon Indigenous people by the policy of forced removal in particular and the project of colonisation in general and, on the other hand, the recognition of contingency, of the potential for the political strategies used to solve or master problems (in this case the 'Aboriginal problem') to go terribly and tragically wrong. My suggestion, in other words, is that the parliamentary apology, though intended to provide the first full and unequivocal public acknowledgement by the Commonwealth Government of the indignity and hurt inflicted upon the Stolen Generations, was persistently intruded upon by a recognition of an entirely different kind: that of the deeply fraught nature of remedial government policy and the capacity of the law to perpetrate barbarism in the name of civilisation and destruction in the name of protection.

The aim of this paper is to make some sense of these two forms of recognition, to explore their implications and, more particularly, the way in which they might enhance or interfere with one another. Two key questions guide the inquiry. Firstly, what, politically speaking, would constitute a sufficient performance or enactment of the promise of 'never again'? What kind of amends need to be made to Indigenous people to demonstrate that the apology was sincere and the Government has fully resiled from the policies that caused such suffering? Secondly, and more troublingly, to what extent is the promise of 'never again' a promise that can be made? To what extent, in other words, is it consistent with the nature and limits of political action to make guarantees about the future in this way? The first of these questions leads, almost inevitably I will suggest, to a reconsideration of the question of Aboriginal sovereignty. If the suffering inflicted upon Indigenous people can be attributed to the abuse of government power, putting Aboriginal rights out of the reach of the Parliament by embedding them in the *Constitution* emerges as an attractive and perhaps necessary form of amends. The pathway out of the second question (and its implications for the first) is, however, more uncertain. If it belongs to the possibilities of politics for deeds to be committed that can only be recognised as injustices belatedly, it is difficult to know how much confidence can ever be placed in the promise of never again. Indeed, as an acknowledgement of sovereign violence perpetrated

in the name of humanitarian welfare, the apology may paradoxically have been both an invitation to Indigenous people to trust the government and a reminder of why their trust has so often been misplaced.

I On the Recognition of Suffering

In a seminal essay on the merits of public apologies, Trudy Govier and Wilhelm Verwoerd define apology as a 'speech act' in which perpetrators seek to make amends for the lack of respect shown to the victims of their wrongdoing. In their persuasive dissection of apology, this process of 'making amends' occurs in two interdependent stages. In the first place, the perpetrator sets out to make 'moral amends' by 'unstating' the claim, implicit in the act of wrongdoing, that the victim 'has no moral worth and merits no moral consideration'.¹¹ At the centre of every act of apology, according to Govier and Verwoerd, is a threefold gesture of recognition: firstly, of the wrongdoing itself, secondly of the status of the victims as moral equals, and thirdly of their right to harbour feelings of anger and resentment in relation to the pain they have suffered.¹² A heartfelt apology makes 'moral amends', according to Govier and Verwoerd, because it demonstrates that the perpetrators have come to see their actions in the same way as their victims (ie, as a wrongdoing) and that they firmly renounce the disrespect that those actions implied. As the authors go on to suggest, however, it is usually not enough for perpetrators to just say the word 'sorry'. They must also show that they really *mean* it by making a commitment to undertake certain kinds of 'practical amends'. From the authors' perspective, an apology that is not followed by relevant concrete measures of reparation is, at best, likely to seem hollow and insincere and, at worst, likely to add a further insult to the original injustice.¹³

Measured against this ideal account of reparation, the parliamentary apology to the Stolen Generations was by no means without merit. In the motion put to the Parliament, Rudd gave a much-needed, unequivocal acknowledgement of the wrongdoing of forced removal and the suffering it had caused: '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'.¹⁴ More than simply offering a general acknowledgement of the harms done to Indigenous people, however, Rudd made an effort to enter into the self-understanding of the Stolen Generations by recounting the story of Nungala Fejo, a

Warumungu woman, now in her 80s, who had been removed from her family in Tennant Creek in the early 1930s and moved to the Bungalow in Alice Springs, destined never to see her mother again.¹⁵ Exemplifying a past not yet passed, this tragic narrative of physical and emotional dislocation opened up a small, but nonetheless valuable, window onto the violence of forced separation and its traumatic repercussions. For Rudd, as for the national audience who acted as its witnesses, it was an entry into a different, and altogether more disturbing, perspective on the supposedly benevolent policy of child removal. Through the story of Nungala Fejo, non-Indigenous Australians were given an opportunity to see themselves, if only for a moment, through the eyes of the people they had dispossessed. What they saw (or should have seen) was a powerful reminder of why the apology was a necessary step in the (inevitably incomplete) process of reconciliation.

Far from being the meaningless gesture many accused it or suspected it of being, therefore, the apology was itself an important act of recognition. By saying sorry for its discriminatory policies and laws, the Parliament not only acknowledged the seriousness of the harms done to Indigenous people, but reaffirmed their human worth and civic equality. Rudd's pointed appeal to non-Indigenous Australians 'to imagine for a moment if this had happened to you'¹⁶ was evidently premised on an assumption of shared vulnerability and invoked a community of equals united by their common exposure to (and experience of) suffering and loss. Signalling a dramatic retreat from the earlier racist view that Indigenous people were largely insensible to the removal of their children, this recognition of common humanity was a critical first step in reviving the process of reconciliation that had stalled during the years of the Howard Government.¹⁷ By taking the sufferings of Indigenous people seriously or recognising that they 'go deep', as Raimond Gaita has put it, the apology simultaneously justified their feelings of anger and provided grounds for relinquishing them.¹⁸ Although they could hardly be expected to forgive their injuries, let alone forget them, Indigenous people could at least feel that the depth of their pain had been genuinely acknowledged. For all its limitations, therefore, (and, as we shall see, these were not insubstantial), the apology made an important contribution to the rebuilding of trust.

If the event did not live up to its promise, therefore, it was not because it failed as a form of moral amends. It was rather because the 'practical amends' offered in support of the

apology were not properly related to (or aligned with) the injustice in question. As critics like Peter Read, Anna Haebich, Robert Manne and Robert van Krieken have persuasively argued, the policy of forcibly removing 'half-caste' children from their families was, at least when seen in retrospect, an arbitrary interference into the affairs of Indigenous people and a terrible violation of their emotional world.¹⁹ Particularly in those phases of its life when the policy took on the more sinister appearance of a calculated exercise in racial engineering – one motivated by fears of miscegenation – it was clearly a breach of liberal values and out of keeping with the rule of law (once again as these are now understood).²⁰ By using racial theories and categories as a framework for action, State and Territory governments forcibly removed children from families that were in no way abusive or dysfunctional and which, under normal circumstances, would have been shielded from outside interference by the common law.²¹ Rather than a practice conducted on a case-by-case basis according to substantiated (legally proven) claims of abuse and neglect, in other words, child removal became a general policy, enacted upon a specific minority group on the basis of nothing more than their 'racial' identity.²²

In the wake of this extraordinary abuse of power, Indigenous people could hardly be expected to reinvest trust in the Government without some attempt to address the institutional flaws that led to their suffering. If the apology is to fulfil its stated aim of allowing Indigenous people to move forward 'with confidence to the future', it needs to address the underlying cause of the suffering experienced by the Stolen Generations: the violence of the sovereign itself. Doing so, as advocates of reconciliation have been suggesting for some time, requires something more than a recommitment to improve the living conditions of Indigenous people. What is also and even more critically required is significant institutional and constitutional reform. In his Wentworth Lecture of 2000, 'Beyond the Mourning Gate', for instance, Patrick Dodson made it clear that health, housing, education and employment 'are matters government should be concerned to address in its normal responsibilities to its citizens'. What the process of reconciliation demanded, by contrast, was a 'beneficial resolution of our status as the first peoples of this country and restitution for the way our inheritance as owners and custodians of the land have [sic] been taken from us'.²³ At the heart of the 'reconciliation dynamic', in other words, was not more 'bureaucratic solutions', but a change to the 'political architecture of the country'.²⁴ Without this, to use the words of Govier and

Verwoerd, Indigenous people will have no real assurance that the institution that has been oppressive or cruel in the past – in this case the Australian state – is ‘not going to lapse back into its bad old ways’.²⁵

The most convincing way in which the Australian Government could provide that assurance in this case is by compensating Indigenous people for their suffering and, perhaps even more importantly, embedding their rights in the *Constitution*. The need to compensate victims of rights violations is a well-established principle in municipal and international law (essential, in many respects, to the very functioning of legal systems) and was one of the most important of the 54 recommendations of *Bringing Them Home*, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.²⁶ The task of providing adequate compensation to individuals and groups in cases like the Stolen Generations is, of course, a deeply fraught enterprise and can easily appear either tokenistic or insulting. Ideally speaking, reparation means a restoration of the *status quo ante*, a return to the situation prior to the commission of the wrongdoing. It therefore reaches its limit, its point of utopian impossibility, in situations like the present one where the losses in question are irreplaceable and the damages irreparable. How one goes about the business of reparation in such instances – those where no amends could ever be adequate to the injury – remains a profoundly problematic field of moral and political inquiry. Even in these limit cases, however, compensation, where it is desired by the victims, can still serve a range of legitimate purposes.²⁷ Perhaps the most important of these in the current context, aside, of course, from that of ameliorating damages, is to demonstrate that the wrongdoer fully resiles from the wrong and is prepared to establish disincentives against its repetition in the future.²⁸

For similar reasons, the sincerity of the apology is likely to remain in question until Indigenous people are granted some form of constitutional recognition that places their rights out of the reach of the Parliament. Following a line of argument recently developed by Alex Reilly, it is not sufficient for the government to simply acknowledge that it made ‘bad laws’ in the past. If it is serious about its promise of ‘never again’, it must also make constitutional amendments to ensure that such discriminatory laws cannot be made in the future.²⁹ Pleas for the ‘constitutional recognition’ of the rights of Indigenous peoples are, of course, not new to the reconciliation debate in Australia.³⁰ Yet, as the first explicit acknowledgement of the

failure of government to secure Indigenous people against its own excesses, the apology gave (or should have given) these pleas renewed salience. By saying sorry, the Government was not simply acknowledging the wrongfulness of past actions, but also, if perhaps only implicitly, acknowledging the dangers inherent in seeking to master the ‘Aboriginal problem’ through the continued exercise of its own unlimited sovereignty. Though Rudd may never have intended to revise the institutional configuration of the Australian polity, therefore, the apology would appear to have made a reconsideration of the question of constitutional recognition of the sovereign rights of the Aboriginal people more or less unavoidable. At the very least, it would seem to be incumbent upon the Government to now take some measures to limit the sovereign power that made the forced removal of Aboriginal children possible.³¹

In a move reminiscent of John Howard’s emphasis upon ‘practical reconciliation’, however, the Prime Minister assumed the best way to support the apology was through concrete action that addressed Indigenous disadvantage. Though Rudd did go some way towards responding directly to the injustice of forced removals by proposing ‘expanded Link-Up and other critical services to help the stolen generations to trace their families’, the ‘core’ of his promise for the future consisted of a range of measures designed to bridge the gulf between Indigenous and non-Indigenous Australians across a range of socio-economic indicators: infant mortality, educational achievement, employment opportunities, and life expectancy.³² ‘The truth is’, Rudd claimed, ‘a business as usual approach towards Indigenous Australians is not working’.³³ What was urgently required was ‘a new beginning, a new partnership, on closing the gap’ one with ‘sufficient flexibility’ to meet the needs of diverse Indigenous communities while remaining closely tied with ‘national objectives’.³⁴ As a demonstration of his seriousness to address these matters of distributive justice, the Prime Minister formally invited the Leader of the Federal Opposition to form a bipartisan ‘joint policy commission’ on Indigenous affairs (instructively described as ‘a kind of war cabinet’) whose first priority was to be the development and implementation of ‘an effective housing strategy for remote communities over the next five years’.³⁵ The much anticipated ‘new beginning’ for Australia was thus quickly reduced to a new policy setting (not entirely distinguishable from the old one) aimed at reducing social distinctions between Indigenous and non-Indigenous Australians.³⁶

If the assumption underpinning this move was that the apology would, by itself, do little or nothing to eliminate disparities in life chances between Indigenous and non-Indigenous Australians, then Rudd (and the others) clearly had a point. It is doubtful whether the act of saying sorry will do anything, at least directly, to alter the well-documented, comparatively poor outcomes of Indigenous Australians in relation to infant mortality and life expectancy. It will not resolve chronic health and housing problems and will not overcome the over-representation of Indigenous people in prisons and unemployment queues. Assuming, however, that the purpose of the apology was not to address Indigenous disadvantage but to address the abuse of governmental power, policies designed to 'close the gap', however necessary and however beneficial they prove to be, would appear to be largely beside the point. The practical amends that the Government was called upon to make in this instance were not those that might address the *general* suffering of Indigenous people, but the *particular* suffering visited upon Indigenous people by the misuse of its power. Indeed, more than simply being disconnected from the injustice in question, Rudd's commitment to general improvements in Indigenous health constituted a promise, so broad in application and so exposed to contingencies of all kinds, that it effectively undermined its own meaningfulness. In so far as it could be counted as a promise at all, it was not one to which the government might realistically be held accountable.

As a consequence of this misreading of the practical amends required by the apology, the Government effectively denied itself the only measures by which it could show that it had fully resiled from past actions. As is well known, the Prime Minister flatly refused to engage the issue of compensation, suggesting that Indigenous people would need to pursue their claims against the national government through the courts.³⁷ The problem with going about things in this way is not simply, as the *Cubillo and Gummer* test case revealed, that members of the Stolen Generations will face unduly difficult evidentiary tests to prove their entitlement to compensation.³⁸ It is also that it detracts from (and partly undermines) the 'moral amends' achieved by the act of saying sorry. Rather than a means by which the Government might demonstrate the sincerity of its apology, compensation has been treated as a legal right that stands or falls quite independently of it.³⁹ A similar fate seems to have befallen the issue of constitutional recognition. Though, in his address to the House, Rudd did suggest that the newly established 'joint policy commission' might look at 'constitutional recognition

for the first Australians', such action was made contingent upon the implementation of the housing strategy for remote communities.⁴⁰ Not only did this relegate the question of Aboriginal sovereignty to a secondary status, it denied it any direct relationship to the apology itself. Constitutional recognition was presented as an optional measure, to be taken sometime down the track, rather than an urgent response to the injustice of forced removal.

II On the Recognition of Contingency

The symbolic power of the parliamentary apology notwithstanding, therefore, monetary compensation and constitutional recognition (and not just for the Stolen Generations) stand out as the important 'unfinished business' of the reconciliation process, the key to the full recognition of Indigenous suffering and the realisation of the promised new beginning. Even if the obligations towards 'practical amends' arising from the apology were fulfilled, however, Indigenous people might still have grounds for reserving or withholding their trust in the promises of the Australian government. The justification for this reticence (or so I would argue) arises from a deeper meditation on the nature of political action and the difficulty, if not impossibility, of eradicating injustices from the realm of human affairs. Hopefully, it is now inconceivable that a government in Australia should try to engineer social unity, or eliminate a perceived threat to it, by forcibly removing children from their families on racial grounds. Yet, as a wrong whose acknowledgement was long delayed, the dark episode of the Stolen Generations points to a more general concern that certain types of harm carry the label 'historical injustices', not just because they refer to events that took place in the past, but because the passage of time is crucial to the recognition of those events *as injustices*. While, as I shall go on to argue, the belated nature of recognition does not prevent us from taking responsibility for historical wrongs, it does place a question mark over our promises about the future. Put simply, if we did not know we were committing injustices in the past, how much confidence can be placed in the promise that we will not commit them again in the future?

In what follows, I will argue that Rudd's apology speech did not properly come to terms with this problem of belated recognition (or what, following Patchen Markell, I will go on to call 'tragic recognition') and, as a consequence, risks repeating the very injustice for which he sought to atone. As we will see, Rudd appeals to a set of universal moral

standards, a transhistorical sense of right and wrong, in order to dismiss suggestions that the apology was a misguided attempt to apply the moral standards of the present to the political decisions of the past. While I have considerable sympathy for this attempt to short-circuit accusations of historical anachronism, the assumption that we can achieve moral clarity simply by heeding 'our most basic instincts'⁴¹ readily lends itself to further abuses of power. Instead of counselling caution out of the recognition that we can never be completely sure how future generations will regard us, the appeal to universal morality invites us to mobilise the full extent of our powers in the service of what we now know to be right. The potential, already presaged in Rudd's 'war cabinet', for this combination of moral certainty and sovereign power to undermine the valuable lesson of being humbled in apology is enormous. Against this appeal to basic moral truths, I will argue for the recognition (as opposed to repression) of contingency in politics. Contrary to what might be expected, however, I will reject the idea that giving due recognition to unpredictability either vitiates the need for apologies or undermines promises about the future. On the contrary, it is the dimension of contingency in politics that makes the practice of public apology and promise-making so important.

Like all apologies, the one offered to the Stolen Generations was premised upon negative judgments of past deeds. In his speech to the Parliament, the Prime Minister freely admitted that 'the laws that our parliaments enacted made the Stolen Generations possible'.⁴² 'The uncomfortable truth for us all', he went on to suggest, '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'.⁴³ For Rudd, the uncomfortable nature of this truth appeared to be confined to the fact that it was a dark chapter in 'our' history that most of 'us' found difficult to face. Implicit in his comments, however, lay another sense in which this truth might be considered uncomfortable: as a 'fully lawful' enterprise, largely unchallenged at the time of its operation, the practice of forced removals pointed to the possibility that certain kinds of actions only become clearly recognisable as injustices *in retrospect*. There were two reasons why this prospect was particularly disturbing in the context of a practice of atonement. In the first place, it put in question the basis of saying sorry. If an apology is a gesture of remorse, offered by agents of wrongdoing in recognition of the suffering caused by their malicious acts, it would not appear to be applicable

to things done in good conscience and with the support of the law.⁴⁴ Secondly, it put into question the basis of promising 'never again'. If a promise is an undertaking about how things will be in the future, it can never be fully relied upon where actions can have unpredictable consequences and take on different meanings with the passage of time.

To the extent that these were the key questions for the apology to address, the pivotal moment in Rudd's speech clearly arrived in the form of the rhetorical question: 'why apologise'?⁴⁵ Keen to dismiss claims that the episode of the Stolen Generations was 'somehow well motivated' and thus 'unworthy of any apology',⁴⁶ the Prime Minister explicitly rejected the historicist argument that the policy of generic forced removal was a product of its times, explicable, if no longer justifiable, in light of prevailing (white) norms. Instead, drawing inspiration from the story of Nungala Fejo, he put forward the view that it offended against certain 'fundamental' human sensibilities.⁴⁷ In his account, the forced removal of Indigenous children remained, despite its lawfulness, an affront to a more basic, more deeply embedded moral code: 'The hurt, the humiliation, the degradation and the sheer brutality of the act of physically separating a mother from her children is a deep assault on our senses and on our most elemental humanity'.⁴⁸ The critical function played by the idea of 'elemental humanity' in this passage was to open up a distinction between acting lawfully and acting morally that could be turned back on the governments that made the Stolen Generations possible. As Rudd would have it, these governments had manifestly failed to align the law with the dictates of morality and were thus guilty of an injustice that stood in urgent need of reparation. To refuse to say sorry in light of 'these facts' would, he suggested, be to once again 'suspend our most basic instincts of what is right and what is wrong'.⁴⁹

Given the routine nature with which governments seek to deny responsibility for wrongdoing, this insistence on moral culpability represents a laudable and courageous reflex. Whether our 'basic instincts' can carry the moral load that Rudd places upon them is, however, open to question. To follow his account is to conclude that there is really only one possible explanation for the policy of forced removals: in this instance, almost everyone, from the engineers of the policy to the public who failed to speak out against it, must have 'suspended' their basic instincts of right and wrong. The problem with this account is the lack of attention it pays to the ideological conditions in which the policy was developed,

the variety of motives that drove it and the variations that it underwent over time, particularly the change in rationale from absorption to assimilation. Doubtless any general claim of 'good intentions' is both too broad and too convenient to be credible and Rudd was right to reject such a thinly veiled attempt at exculpation. Yet it is hard to make sense either of the appeal of the policy to the colonial public or the sense of shame and disbelief it engendered among the postcolonial public without connecting it to the moral ideal of civilisation and its late-modern revisions (a point I will return to later). If, therefore, we are to come to a clearer understanding about the judgments we can make about the past (and, by implication, the promises we can make about the future) we need a more sophisticated understanding of the ways in which moral insight is tied to or restricted by historical context.

Although any general consideration of this question of historicism in morals is beyond the scope of this paper, it is possible, drawing once again on the work of Govier and Verwoerd, to make some limited observations in relation to the episode of the Stolen Generations. In a companion piece to their paper on the promise and pitfalls of apology, an essay entitled 'Taking Wrongs Seriously: A Qualified Defence of Public Apology', Govier and Verwoerd set out, inter alia, to respond to the problem of historical relativism in moral judgments. At the centre of their inquiry is the critical question of whether public apologies for old wrongs, consciously or unconsciously, judge the actions of the past against the values of the present and are thus guilty of the 'fallacy of presentism'. Citing the case of the Stolen Generations as a relevant example, they advance three preliminary arguments against the accusation of historical anachronism. In the first place, they suggest, some of the actions upon which we are now called to pass judgment 'were wrong even by the standards of the time at which they occurred' (and are thus rightly treated as injustices). Secondly, some of these actions 'could have been inferred to be so by elementary logical reasoning from other principles in acceptance at the time in question'. Finally, some of these actions were criticised at the time, if only by a minority, disproving 'any contention that it was impossible to make the relevant moral judgments in the historical context in which the wrongs were committed'.⁵⁰

Although presented separately, each of these claims is, in effect, a variation or modulation upon the same idea; namely, that many of the actions now being judged as injustices either *were* understood to be wrong at the time or *should* have been understood to be wrong at the time if due consideration

had been given to the full range of contemporary values and public opinions. The first of these claims – that some things *were* known to be wrong at the time – seems relatively uncontroversial and has obvious application in relation to the assaults upon Indigenous children perpetrated in state and church institutions under the removal policy. The second – that some things *should* have been known to be wrong – is, however, more difficult to sustain, if only because it entails a rather more complex form of historical reckoning. It is by no means clear, for instance, that 'elementary logical reasoning' from extant moral principles would have been sufficient to bring political agents to an awareness of the wrongfulness of forced child removal. This is not because such practices were consistent with existing moral principles (clearly they were not), but because the inconsistency was hidden by deeply entrenched racist assumptions. Probably the most important lesson the *Bringing Them Home* Report has to teach us, claimed Robert Manne, is 'how almost no-one was able to see through the kind of racism which could make it seem that tearing Aboriginal children from their mothers and communities was a natural, even noble act'. In a report filled with striking testimony, one of its most lasting impressions was the degree to which 'ways of thinking' could be 'disfigured by the all-pervasive racism of the times'.⁵¹

Similarly, caution needs to be exercised in relation to the moral significance of extant public criticism. Clearly the mere fact that there were dissenting views, that there were people who spoke out against a certain policy or practice, does not in itself prove either that they were making 'the relevant moral judgments' or that they should have been more closely heeded by their contemporaries. With the advantage of hindsight it is, of course, possible to select viewpoints from the past that are broadly in accord with contemporary, anti-racist values and validate them as exemplary exercises in moral judgment. However, to assume that those living in the moment ought to have come to similar conclusions is to assume they were able to adopt a perspective on their own times that was not available to them: the perspective of the future looking back on the past. The conclusion that may sometimes need to be drawn from the existence of dissenting views is not that some people in the past made the right moral judgments while others did not, but that the existence of competing and potentially incommensurate values make moral judgments inherently contestable and, in some cases, difficult to adjudicate until the full story has unfolded. As Robert van Krieken has noted in relation to the removal of Aboriginal children, there were 'scattered voices of critical

dissent at almost every point of the policy's history', but it was not until a 'large body of subsequent historical research' had been undertaken 'that it [became] more widely recognized how destructive and damaging a practice it was'.⁵²

To argue in this way is, of course, to risk becoming an apologist in the other, less defensible, sense of the word and it is a trap that must be studiously avoided, especially for those whose interests it serves. Notwithstanding the 'all-pervasive' racism of the time, it is clear that the intentions of the different governments involved in the policy of forced removal were by no means always above reproach and that political actors often did not take enough trouble, in Arendt's memorable phrase, 'to think what [they were] doing'.⁵³ Precisely how far misguided, but supposedly good, intentions excuse the various governments involved in child removal from what, seen from the perspective of its victims, was always a cruel and inhumane practice remains unclear. Attempting to disentangle the different motivations for the policy (or indeed decide whether intentions should be privileged over consequences in attempts to determine whether it deserves the label genocide)⁵⁴ is a difficult historical and legal enterprise and one that, not surprisingly, continues to be a subject of dispute. The defence of misguided paternalism certainly seems weakest in relation to the period from 1930 to 1945 during which child removal was driven, with the support of the Commonwealth Government, less by the aim of 'rescuing' half-caste children from degradation and more by the eugenicist idea of 'breeding out the colour' through biological absorption. At this point in its history, the policy of child removal was clearly motivated by fear of racial impurity rather than compassion for suffering children and deserves to be scrutinised, if retrospectively, against the United Nations *Convention on the Prevention and Punishment of Genocide* of 1948.⁵⁵

As important as it is to press the responsibilities of governments as far as they can go legally and morally, however, there is still a point at which it becomes necessary to acknowledge that political action is subject to contingencies that can never be fully mastered. If we are not to fall for inflated notions of agency that assume all harms are ultimately either 'intentional' or 'foreseeable', we need to remain mindful (if still sceptically mindful) of what political agents might legitimately have imagined themselves to be doing at the time. Among other things, this entails acknowledging that insight into wrongdoing is sometimes contingent either upon changes in background understandings (in this case,

about the nature and value of Aboriginal culture) or upon revelations about the actual consequences of actions (in this case, about the terrible suffering inflicted on Aboriginal people) and sometimes both at once. At the very least, it seems important to recognise the contradiction involved in insisting that our predecessors should have seen what they were doing while at the same time acknowledging how much they were blinded by racial prejudice. Seen through the eyes of people at the time, there may have been nothing inherently contradictory about forcibly removing children from their mothers while claiming to have the best interests of Indigenous people at heart. The problem was not that their intentions were malevolent, but, as Raimond Gaita puts it, that they were 'saturated with profound disdain for the Aborigines'.⁵⁶ Put differently, it was not that the destruction of Aboriginal society (as distinct from Aboriginal *people*) was unforeseen or unintended, but that it was either not regarded as a harm or, if a harm, as one that was morally outweighed by the benefits of civilisation.

Presented in more general terms, the argument being advanced here is that our ability to comprehend the policy of forced removal *as an injustice* is based on a kind of 'tragic recognition' (*anagnôrisis*). In Patchen Markell's reading, the essence of this concept lies in our lack of mastery over our actions and the implications this carries for our sense of identity. Markell begins from the premise that our interactions with others are fundamentally 'shaped by what we know, or what we think we know, about who we and others are'.⁵⁷ Yet, as he goes on to argue, political action is exposed to 'worldly contingency' in a way that often exceeds or puts a lie to these assumptions about identity. Markell, following Arendt, locates the sources of 'worldly contingency' in the ontological conditions of action itself: causality and plurality. To act is to enter a 'world of causality', to be an initiator of effects. Yet, since it is impossible to know in advance what those effects will be, agents are capable of 'initiating sequences of events that, once begun, proceed without necessarily respecting [their] intentions'.⁵⁸ The problem with this, according to Markell, is not simply that our actions have unanticipated consequences, but that it is never entirely clear where our responsibility begins and ends.⁵⁹ Similarly, political action is only possible in the context of 'a world inhabited by a plurality of other acting persons'.⁶⁰ Without others to witness and give meaning to our acts they would have no reality. Yet the condition of plurality also means that our actions are always intersecting with (and being blown off course by) the actions and reactions of others. Not only does this make the

consequences of our actions unpredictable, it gives us little control over the meanings they acquire in the public realm. What we claim to have done and what others claim we have done can be two quite different things.

Taken together, according to Markell, these two sources of worldly contingency, causality and plurality, expose our inability to control what happens or, as he puts it, 'our own finitude in relation to the future'.⁶¹ Almost inevitably, and herein lies the basis for tragedy, our actions escape or exceed our intentions, returning in forms that were not only never anticipated, but which have the power to 'undo us'. Perhaps the most disturbing implication of the fact that action takes place under conditions of worldly contingency is that the things we do in the name of humanity or justice or civilisation or order can, with the passage of time, take on entirely different connotations, bringing us into conflict 'not only with what [we] disavow, but with [our] own deepest commitments'.⁶² To see this possibility realised, as many of the tragic heroes do, is to be presented with something far more shocking than the unintended consequences of our actions. It is to be confronted with the collapse of the 'identificatory scheme', our sense of who we and others are, that we have used to govern our activity.⁶³ As Markell puts it, 'scenes of tragic *anagnôrisis*' do not simply entail moments in which identities are happily confirmed and consolidated. They extend also to 'moments of catastrophic loss, occasions for mourning, provocations to strike out one's eyes'.⁶⁴ Confronted with what they have done and, at a deeper level, with the tragic nature of action itself, agents can find themselves 'caught between the desire to deny, and the evident impossibility of denying, what is before their eyes'.⁶⁵ More than simply a 'retrospective re-experiencing of a set of events as a "significant whole"', then, *anagnôrisis* entails an appreciation of contingency and of our inability to be fully master of our own deeds and identity.⁶⁶

The ever-present risk with appeals to tragedy is that they cloud, rather than illuminate, our understanding of culpability, placing agents at the intersection of irreconcilable conflicts or at the mercy of forces beyond their control in ways that make their actions seem more justifiable than they really were. This risk notwithstanding, there are grounds for suggesting that the concept of *anagnôrisis* fills a gap in our moral calculus, allowing us to find a place *both* for the good intentions of our predecessors and our own feelings of shame in relation to the Stolen Generations. At first blush, the practice of forced removal seems a poor illustration of the unpredictability of

action since the break up of Aboriginal society was not so much an unforeseen consequence as an explicit intention of the policy. As historians have convincingly argued, the policy of removing Aboriginal children was, even in its more benign phases, clearly meant to sever traditional ties to family, culture and country.⁶⁷ What makes the intention redeemable in this case, once again with the exception of the inter-war years, is that the destruction of those connections was seen to be a means to an end, not an end in itself. As Anna Haebich has shown, those engaged in the policy of removal were neither completely unaware of the pain they were inflicting upon Indigenous people nor, in some instances, entirely lacking in compassion for their suffering. They simply assumed (or managed to convince themselves) that subjecting Indigenous children to the 'civilising regimes' of state institutions and white homes was in their best interests.⁶⁸ What was unanticipated from their perspective was not that the removal of children would be destructive of their Aboriginality, but that 'civilising missions' would come to be regarded as dimly as they now are.⁶⁹

For non-Indigenous Australians, the moment of tragic recognition, a moment simultaneously fiercely resisted and shamefully accepted, arrived with the publication of the stories of the Stolen Generations and the description of the practice of forced removal as genocide. What made the revelations of the Stolen Generations particularly explosive was the fact that it forced a fundamental re-evaluation of the 'identificatory scheme' by which non-Indigenous Australians had previously governed their activity: their sense of themselves as humanitarians and agents of civilisation.⁷⁰ As Raimond Gaita first suggested, shame was a more appropriate emotion than guilt in this context because it entailed a form of responsibility for the past that was based less upon legal notions of culpability and more upon a sense of national identification. Australians of the current generation owed Indigenous people an apology, he claimed, not because they were personally guilty of wrongdoing, but because their attachment to the nation made them responsible for what had been done, even with the best of intentions, in its name.⁷¹ Shame seems a particularly apposite response in this context because it is an emotional correlate of coming to see oneself in a different, much less appealing, light. Generally speaking, to quote from Michael Fagenblat's excellent essay on the apology, an act 'only becomes shameful when one goes over what one has done and endures it from a new perspective'.⁷² More precisely, 'shame is inseparable from the experience of being seen, and especially from the experience of being

seen in an unanticipated light, such as arises when the point of view of someone else, previously unnoticed, obtrudes'.⁷³ Among other things, the stories of the Stolen Generations provided Australians this new perspective, giving rise to a sense of 'collective shame for who we were, before we saw what we now see'.⁷⁴

At first glance the emphasis upon contingency that is central to the concept of tragic recognition would appear to be inconsistent with the practice of public apology. Yet if, following Gaita and Fagenblat, our responsibility for past injustices is grounded in shame rather than guilt, there is no reason why an apology cannot be offered in recognition of the misshapen identity of the political community (and the need to reform it).⁷⁵ It is instructive in this context that Govier and Verwoerd do not ultimately rest their argument in favour of public apologies on the need for contemporaries to know they were engaged in wrongdoing. Regardless of what might be expected from political agents in times gone by, or in what the authors elsewhere suggestively refer to as the 'morally distant past',⁷⁶ citizens in the present have a right to re-evaluate past actions in light of contemporary norms. 'An even more fundamental basis for resisting Presentism', they write, 'is that whatever the moral values of the past, contemporary moral agents exist in the present'. 'In the final analysis', they go on to suggest, 'it makes little sense for them to judge by moral standards that are not their own'.⁷⁷ For Govier and Verwoerd, in other words, the 'ultimate implication' of presentism – that no apology should be offered for actions that were not understood to be injustices at the time they were committed – is simply unacceptable. To see things in this way would be tantamount to saying that the political community, as it now seeks to constitute itself, is prepared to condone 'institutions and practices such as slavery, colonialism or the compulsory sterilisation of so-called mental defectives'.⁷⁸ The value of public apologies, in other words, can sometimes lie less in accepting blame for who we were in the past and more in taking responsibility for who we want to be in the future.

If an acknowledgement of contingency poses a problem to the practice of public apologies, therefore, it is not so much in terms of the judgments we can make about our past, but in terms of the promises we can make about our future. Assuming that an element of unpredictability cannot be eradicated from politics, we can never be sure that the actions we undertake in the present, however well motivated, will not be perceived by future generations as grave injustices.

What emerges most clearly from the ironic coincidence of the apology for the policy of forced removal (enabled by racially discriminatory legislation) and the current 'intervention' into Indigenous communities in the Northern Territory (enabled by racially discriminatory legislation), is the ambiguous position of citizens as spectator-actors and the importance of using our reflection on the past to inform our policies in the future.⁷⁹ As citizens, burdened with responsibilities for others, we find ourselves in the difficult double position of having to look back on our ancestors with a critical eye while never knowing, as Frank Brennan astutely remarked, '[w]hat will be said of all of us in two generations' time'.⁸⁰ The risk is that the judgments we make about the past in our capacity as spectators will be handed down far too severely, while the commitments we make about the future in our capacity as actors will be taken far too lightly. In this case, the failure to fulfil the promise of 'never again' would amount to the most serious of political betrayals: that of the (newly constituted) identity of the political community.⁸¹

III Conclusion

Whether or not we avoid that betrayal depends very much on how we approach the vow of 'never again'. If it is seen as a guarantee, a confident assertion against human finitude in relation to the future, it is forever at risk of becoming a hollow or even dangerous gesture. By their very nature, guarantees, unlike what I will go on to call 'promises' (following the meaning given to that term by Arendt), tend to presuppose a mastery of circumstance and focus upon results rather than principles.⁸² It is inherent to the concept of a guarantee that the person or institution that offers it has the capacity to 'deliver' in the face of the uncertainties of the future. Rather than acknowledge and make allowances for contingency, guarantees reduce the world to mere matter, to be manipulated at will. Equally, since a guarantee relates only to an outcome, it is bound to an instrumental logic in which ends are privileged over means. By definition, the measure of a guarantee is found in the result, not the process by which it is achieved, and this opens the door to any number of shortcuts and abuses. Understood as a guarantee, therefore, the vow 'never again' amounts to a denial of contingency that has the potential to defeat the very apology that provides the occasion of its utterance. To the extent that guarantees forcefully reinscribe, rather than reflectively question, the assumptions of moral certainty and sovereign control, they merely perpetuate the conditions that lead to excessive uses of power.

By contrast, when the vow 'never again' is seen as a 'promise' in Arendt's understanding of the term, it has the potential to reframe the very conditions under which 'sovereignty' is both 'held' and 'exercised'. The key to this transformation lies in the way promises integrate tragic recognition into politics.⁸³ Rather than deny the limits of political action, according to Lisa Disch, 'promise-making acknowledges those limits and attempts to work within them'.⁸⁴ In recognition of the unreliability of actors, 'who never can guarantee today who they will be tomorrow', and the unpredictability of action, whose consequences are impossible to foretell, promises work by sharing sovereignty between the self and the other.⁸⁵ As Arendt presents it, promises imply a shift away from a conception of the self as master (the absolute sovereign) because they make others witnesses to, and keepers of, our identity. Trust can be invested in promises because their performance rests less on the integrity of the person that makes them and more on the public realm in which they are witnessed and remembered as representations of who one claims (or undertakes) to be. Ultimately, to use Disch's neat glossing of Arendt, 'it is not the *self* which makes the promise, but the *promise* which makes the self'.⁸⁶ Implicit within this approach is an understanding that promises, in order to be meaningful, must relate to political identities, not social outcomes. The promises that count (and which must be counted upon) are the ones that relate to the principles that govern the political community.

There are good grounds for suggesting that Rudd pressed the vow 'never again' more in the direction of a guarantee than a promise and, in doing so, risked repeating the very injustice for which he sought to atone. As Fagenblat has pointed out, the remarkable feature of the apology was that it represented an act of sovereign exceptionalism not, as is characteristic, in the mode of war, but in the mode of supplication. In this case, sovereignty 'deployed its transcendence with respect to the law in order to practice humility rather than violence'.⁸⁷ Yet this moment of transcendence, this 'extraordinary act of recognition' by which the sovereign owned up to 'the violence of its own sovereignty', did little to change the shape of the political system.⁸⁸ Confident in the assumption that the moral order had been restored, that the law was once again aligned with justice, Rudd dared to treat the apology as a moment of reconciliation without remainder. Reconstituted as a 'fully united and fully reconciled people', Australia could now safely forget the past (and its lessons) and look instead to fixing the distributive injustices that compromised its newly asserted commitment to equality

and non-discrimination. Admirable as the aim appears, Rudd's ambitious programme for 'closing the gap' – the gap, not simply between Indigenous and non-Indigenous life-chances, but between the principles and reality of the postcolonial state – continued to be premised upon the very idea of sovereignty that lay behind the Stolen Generations. More than just a sign of bipartisanship, the 'war cabinet' represented a marshalling of the full power of the sovereign in an effort to resolve the new Aboriginal problem.

On the same day the apology was delivered, however, Patrick Dodson gave a speech to the National Press Club in which a different vision of the political order was articulated. Encouraged by the willingness of the Government to finally acknowledge and renounce past injustices, the former chairman of the Council for Aboriginal Reconciliation ventured to suggest that '[a]fter this moment Australia can be imagined as a different place'.⁸⁹ Like a number of other Indigenous leaders, Dodson's perception of the type of country he was living in and its possibilities for the future had been radically transformed by the unprecedented gesture of apology. Significantly, however, he did not say that Australia *was* a different place, simply that it could now be *imagined* as a different place. Whether it could live up to this promise, whether it could be what was, as yet, merely imagined, was a question for the future. Evidently (and perhaps also experientially) more alive to worldly contingencies, Dodson understood that the apology did not represent the culmination of the process of reconciliation, but the creation of a space in which it might, finally, begin. Yet, as his speech revealed, the prefiguration of that imagined place, that new Australia, was already present in the Government's recognition of its 'misguided attempt to destroy our people' and in its 'commitment to ensure that those "saddest of all stories" will not be repeated in the future'.⁹⁰ Intentionally or not, the apology made the Indigenous people of the country witnesses to (and keepers of) a promise about the identity of the Australian state. If future generations are to mark the apology as a new beginning, this promise will need to find institutional expression.

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- 1 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).
- 2 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).
- 3 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister).
- 4 As Tony Barta has suggested, the apology studiously avoided any mention of the broader injustice of dispossession and the question of genocide. Australia, he suggested, 'is not ready to face the historical truth of its foundation or the ways the original dispossession contributed to the destruction of not just one people, but many peoples who have disappeared during the two centuries of European triumph'. See Tony Barta, 'Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide' (2008) 10(2) *Journal of Genocide Research* 201, 210.
- 5 Andrew Schaap, *Political Reconciliation* (2005) 87.
- 6 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister).
- 7 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 171 (Kevin Rudd, Prime Minister).
- 8 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).
- 9 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).
- 10 See Hannah Arendt, *The Human Condition* (1958) 188–92.
- 11 Trudy Govier and Wilhelm Verwoerd, 'The Promise and Pitfalls of Apology' (2002) 33(1) *Journal of Social Philosophy* 67, 68ff. See also Janna Thompson, 'Apology, Justice, and Respect: A Critical Defense of Political Apology' in Mark Gibney et al (eds), *The Age of Apology: Facing Up to the Past* (2008) 31, 34.
- 12 Govier and Verwoerd, 'The Promise and Pitfalls of Apology', above n 11, 69.
- 13 Ibid 72.
- 14 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).
- 15 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 168 (Kevin Rudd, Prime Minister).
- 16 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).
- 17 Robert Manne quotes one 'Protector' of Aboriginal people for the early 20th century, James Isdell, as follows: 'I would not hesitate to separate any half-caste from its Aboriginal mother, no matter how frantic momentary grief might be at the time. They soon forget their offspring'. See Robert Manne, 'Aboriginal Child Removal and the Question of Genocide, 1900–1940' in A Dirk Moses (ed), *Genocide and Settler Society* (2005) 217, 223.
- 18 Raymond Gaita, 'Why the Impatience? Genocide, "Ideology" and Practical Reconciliation' (July 2001) *Australian Book Review* 25, 28–9.
- 19 See Peter Read, *A Rape of the Soul So Profound* (1999) especially 29–31; Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (2000) especially 225–33; Manne, 'Aboriginal Child Removal', above n 17; Robert van Krieken, 'The Barbarism of Civilisation: Cultural Genocide and the "Stolen Generations"' (1999) 50(2) *British Journal of Sociology* 297.
- 20 Robert Manne has suggested that the amended *Aborigines Act 1936* (WA) that made the Chief Protector the legal guardian of all 'native' children up to the age of 21 (as well as granting certain other powers) 'is perhaps the most illiberal piece of legislation passed by any parliament in the history of Australia'. See Manne, 'Aboriginal Child Removal', above n 17, 235.
- 21 As Robert van Krieken has noted, the legislation which enabled child removal worked by suspending or removing the common law rights of Aboriginal parents over their children. The effect of this was 'to make the state the legal guardian of all children of Aboriginal descent, to be removed at will and sent to a mission, a child welfare institution or to be fostered with a white family if sufficiently light-skinned'. Van Krieken, 'The Barbarism of Civilisation', above n 19, 306.
- 22 To quote Manne once again, 'Removals occurred without any need to refer the matter to the courts, because of gender, age, degree of acculturation to the Aboriginal world, above all racial caste, and not because of suspected, let alone proven, parental or maternal neglect'. Manne, 'Aboriginal Child Removal', above n 17, 223.
- 23 Patrick Dodson, *The Wentworth Lecture: Beyond the Mourning Gate – Dealing with Unfinished Business* (2000) Australian Institute of Aboriginal and Torres Strait Islander Studies, 12

- <www1.aiatsis.gov.au/exhibitions/wentworth/a317361_a.pdf> at 4 December 2009.
- 24 Ibid 10. Dodson returns to the same point in his speech 'After the Apology', noting that institutional and constitutional reform is needed to 'cement an honoured and respected place for Indigenous people within our polity'. See Patrick Dodson, 'After the Apology' (April–May 2008) 94 *Arena Magazine* 20, 21–3. See also Raymond Gaita, *A Common Humanity* (1999) 103.
- 25 Govier and Verwoerd, 'The Promise and Pitfalls of Apology', above n 11, 75.
- 26 See Antonio Buti, 'Bridge Over Troubled Waters: Reparations for Aboriginal Child Removals and British Child Migrants' (2003) 10(4) *E Law – Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v10n4/buti104.html>> at 4 December 2009; Andrea Durbach, "'Little More than a Clanging Gong": The Promise and Progress of Reconciliation' (2008) 7(6) *Indigenous Law Bulletin* 15, 16.
- 27 Both Patrick Dodson and Noel Pearson were unequivocal in insisting that the apology would remain compromised so long as the issue of compensation was not pursued. See Dodson, 'After the Apology', above n 24, 22; Noel Pearson, 'Contradictions Cloud the Apology to the Stolen Generations', *The Australian* (online), 12 February 2008 <<http://www.theaustralian.com.au/news/features/when-words-arent-enough/story-e6frg6z6-1111115528371>> at 4 December 2009.
- 28 As Janna Thompson has suggested, the value of providing compensation for victims lies not simply in the way it mitigates harm, but in the way it 'sets a precedent in law or government practice, thus bringing into existence a disincentive against further offenses'. Thompson, above n 11, 42.
- 29 Alexander Reilly, 'The Inherent Limits of the Apology to the Stolen Generation', University of Adelaide Law School Research Paper 2009-002 (2009) 2 <<http://ssrn.com/abstract=1294101>> at 4 December 2009.
- 30 For an excellent overview see Paul Patton, 'Reconciliation, Aboriginal Rights and Constitutional Paradox in Australia' (2001) 15 *Australian Feminist Law Journal* 25.
- 31 Contrary to what some critics of reconciliation have feared, therefore, the apology is not simply a distraction from the more urgent concern of negotiating a treaty between the Indigenous and non-Indigenous peoples of Australia. In fact, as Thompson has astutely observed, such a treaty might be the best way to demonstrate that the apology was serious. See Thompson, above n 11, 43.
- 32 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 171 (Kevin Rudd, Prime Minister).
- 33 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 171 (Kevin Rudd, Prime Minister).
- 34 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 171 (Kevin Rudd, Prime Minister).
- 35 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister).
- 36 The worry with the policy of 'closing the gap' is that the same *standard* of living implies the same *manner* of living. As Larissa Behrendt has noted, '[e]quality ... is not simply matching the socio-economic statistics and giving Aboriginal people and their children the same opportunities, it also includes ensuring that the space is given to ensure that Aboriginal culture and Aboriginal communities remain vibrant and strong and that Aboriginal identity and history is given space in Australia's national story'. See Larissa Behrendt, *The Apology One Year On ...* (2009) 6 <<http://www.jumbunna.uts.edu.au/research/pdf/ApologyAnniversary2009.pdf>> at 4 December 2009.
- 37 See, eg, Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Inquiry into the Stolen Generation Compensation Bill 2008* (2008) 2 <http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_generation_compenation/submissions/sub83.pdf> at 2 December 2009.
- 38 *Cubillo v Commonwealth* [2000] FCA 1084.
- 39 The case of *Trevorrow v South Australia (No 5)* [2007] SASC 285 has now established that the wrongs done to members of the Stolen Generations can give rise to a legal entitlement to compensation. However, as Noel Pearson rightly pointed out, 'How sincere is it to say sorry [to the Stolen Generations] and then leave them to the pain, cost, inconvenience and uncertainty of interminable court proceedings?' Pearson, above n 27.
- 40 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister).
- 41 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).
- 42 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).
- 43 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).
- 44 This was, of course, one of the justifications offered by the former Government for its refusal to apologise. As the then Minister of Aboriginal Affairs, John Herron, argued: 'You can't judge past

- practices by today's standards ... we do not believe that our generation should be asked to accept responsibility for the acts of earlier generations, sanctioned by the laws of the times'. Cited in Barta, 'Sorry, and Not Sorry, In Australia', above n 4, 203. Herron's claim may have been politically motivated, but as Michael Fagenblat has recently suggested, it was not entirely scurrilous for '[w]ithin a positivistic and perhaps even a strictly liberal theory of state law it makes no sense to apologise for acts that were both legal and not obviously immoral at the time of their commission'. Michael Fagenblat, 'The Apology, the Secular and the Theologico-Political' (2008) 27(2) *Dialogue* 16, 21.
- 45 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 168 (Kevin Rudd, Prime Minister).
- 46 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).
- 47 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).
- 48 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).
- 49 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).
- 50 Trudy Govier and Wilhelm Verwoerd, 'Taking Wrongs Seriously: A Qualified Defence of Public Apologies' (2002) 65 *Saskatchewan Law Review* 139, 151–2.
- 51 Robert Manne, 'In Denial: The Stolen Generations and the Right' (2001) 1 *Quarterly Essay* 1, 92–3. See also Robert van Krieken, 'The "Stolen Generations" and Cultural Genocide: The Forced Removal of Australian Indigenous Children from their Families and its Implications for the Sociology of Childhood' (1999) 6(3) *Childhood* 297, 304–5
- 52 Van Krieken, 'The "Stolen Generations" and Cultural Genocide', above n 51, 298, 300.
- 53 Arendt, above n 10, 5.
- 54 'For Indigenous plaintiffs', writes Behrendt, 'it doesn't matter whether the crime of genocide was committed as it was defined by international law and it doesn't matter whether there was intention or not. What seems to be more important from the Indigenous perspectives are the effects of the actions of the government – these actions have amounted to damage to Indigenous people, families and communities and they choose to use the word "genocide" to describe it.' See Larissa Behrendt, 'Genocide: The Distance Between Law and Life' (2001) 25 *Aboriginal History* 132, 142.
- 55 Although there seems to be an emerging consensus that 'genocidal plans' underpinned the practice of forced removal during the inter-war years, establishing a crime of genocide under international law has, for a variety of legal and moral reasons, proved more difficult and would, if proven, seem to call for something more than an apology and compensation. Outside that limited period (and even within it for some writers), the application of the term 'genocide' clearly risks what John Torpey has recently called 'rhetorical excess'. Although Torpey is far from insensitive to the damages of colonialism, he worries (as I do) that important legal and moral distinctions between practices (for example, annihilation and assimilation) will be lost as a consequence of the political capital that can be gained from invoking the term 'genocide'. A sophisticated debate is only now developing around the extent to which the label can be attached, not simply to particular colonial practices, but to colonisation as a general process. The most significant development in this regard lies in the pioneering attempts of A Dirk Moses and Tony Barta to look at the process of colonisation from a more holistic perspective in which a relentless, and fully intended, process of material and cultural dispossession points towards the reasonable foreseeability of the destruction of Indigenous peoples and cultures. The only point I would make here is that some credence must be given to the idea, however wrongheaded it now appears, that the overriding purpose was not extermination but civilisation. Seen from the perspective of Indigenous peoples, of course, the final result may not appear very different. That, I take it, is precisely Behrendt's point about the distance between law and life and like her, I think reparations are due regardless of the legal findings. What this gap between law and life seems to point to, however, is the tragic possibility that the colonists were doing something different from what they thought they were doing, harming rather than helping or harming *by* helping. See John Torpey, "'Making Whole What Has Been Smashed": Reflections on Reparations' (2001) 73(2) *Journal of Modern History* 333; Manne, 'Aboriginal Child Removal', above n 11; Robert Manne, 'Sorry Business: The Road to the Apology' (2008) 32 *The Monthly* 22; Inga Clendinnen, 'First Contact', *The Australian's Review of Books*, 9 May 2001; Gaita, *A Common Humanity*, above n 24, 107–30; A Dirk Moses, 'Genocide and Settler Society in Australian History' in A Dirk Moses (ed), *Genocide and Settler Society* (2005) 3; Tony Barta, 'Relations of Genocide: Land and Lives in the Colonisation of Australia' in Isidor Walliman and Michael N Dobkowski (eds), *Genocide and the Modern Age: Etiology and Case Studies of Mass Death* (1987) 237–52; Russell McGregor, 'Governance, Not Genocide: Aboriginal Assimilation in the Postwar Era' in A Dirk Moses (ed), *Genocide and Settler Society* (2005) 290; *ibid.*

- 56 Gaita, 'Why the Impatience', above n 18, 28.
- 57 Patchen Markell, *Bound by Recognition* (2003) 63.
- 58 Ibid 78.
- 59 Ibid.
- 60 Ibid 79 (emphasis in original).
- 61 Ibid 63.
- 62 Ibid 81.
- 63 Ibid 86.
- 64 Ibid 62.
- 65 Ibid 87.
- 66 Ibid 65.
- 67 See Haebich, *Broken Circles*, above n 19, 468–77.
- 68 Anna Haebich, "'Between Knowing and Not Knowing": Public Knowledge of the Stolen Generations' (2001) 25 *Aboriginal History* 70, 76, 78, 81.
- 69 This change in perception is illustrated by the terminological shift from 'civilising missions' to 'civilising offensives' and 'civilising regimes'. The claim that the policy of removal was intended to be destructive of Aboriginality also needs to be qualified in relation to the post-war era. As Russell McGregor has shown, assimilationist policies were not inconsistent with the protection of Aboriginal 'culture' (art, ceremony, myths), provided it was 'privatised'; ie, reduced to a 'rather superficial repertoire of folk customs and quaint traditions'. See McGregor, above n 55, 304.
- 70 See van Krieken, 'The "Stolen Generations" and Cultural Genocide', above n 51, 304.
- 71 Gaita, *A Common Humanity*, above n 24, 87–106. A similar point has been made more recently by Michael Fagenblat. 'Unlike guilt', he suggests, 'shame is endured without any personal or intentional wrongdoing'. It is thus possible to suggest that Australians felt (or should feel) ashamed of forced removals despite the fact, firstly, that the policy was not ostensibly in breach of legal or moral principles and, secondly, that they were not personally involved in either its formulation or administration. See Fagenblat, above n 44, 21.
- 72 Fagenblat, above n 44, 21.
- 73 Ibid 21–2.
- 74 Ibid 24. While Fagenblat attributes this experience of shame to a Christian, rather than tragic, provenance, his analysis raises the issue of recognition in similar terms: '[s]hame is a moral experience of *identification* with a wrong one may not have committed or intentionally committed involving an unforeseen recognition of the other': at 22.
- 75 As Peter Read suggested, '[a]n apology does not necessarily imply responsibility for the past; rather it acknowledges that actions and policies once thought right (or at least utilitarian) by government now are revealed to have been wrong. An apology should express this belated realisation to those affected Australians'. See Read, above n 19, 186.
- 76 Govier and Verwoerd, 'The Promise and Pitfalls of Apology', above n 11, 76.
- 77 Govier and Verwoerd, 'Taking Wrongs Seriously', above n 50, 153.
- 78 Ibid.
- 79 The irony of this situation was not, of course, lost on commentators. See, for instance, Dodson, 'After the Apology', above n 24, 23; Tim Rowse, *Australia's Apology: The Shadow on the Sun* (2008) openDemocracy <http://www.opendemocracy.net/article/globalisation/institutions_government/australia_apology> at 4 December 2009.
- 80 The full quote reads as follows: 'What will be said of all of us in two generations' time when the historians start debating the morality and utility of what was being attempted with full indigenous cooperation in the Cape York communities and with unilateral intervention in the Northern Territory while we took time to get right our apology for past wrongs?' Frank Brennan, 'Stolen Generations Apology "about right"' (2008) 18(3) *Eureka Street* <<http://www.eurekastreet.com.au/article.aspx?aeid=5206>> at 4 December 2009.
- 81 As Tim Rowse has suggested, the justice (and necessity) of the collection of measures adopted in the Northern Territory to deal with chronic problems in remote communities has split the Indigenous leadership to an unprecedented degree making judgments about its morality difficult. To my mind, however, Patrick Dodson is right to claim that the 'intervention' threatens to compromise the trust that the apology restored. See Rowse, above n 79; Dodson, 'After the Apology', above n 24, 23.
- 82 The distinction between a 'guarantee' and a 'promise' is heavily influenced by Lisa Disch's insightful reading of Arendt's conception of promise-making and its relation to political action. See Lisa Jane Disch, *Hannah Arendt and the Limits of Philosophy* (1994) 45–54.
- 83 Arendt expresses this recognition of contingency in the following way: 'The danger and the advantage inherent in all bodies politic that rely on contracts and treaties is that they, unlike those that rely on rule and sovereignty, *leave the unpredictability of human affairs and the unreliability of men as they are*, using them merely as the medium, as it were, into which certain islands of predictability are thrown and in which certain guideposts of reliability are erected' (emphasis added). Arendt, above n 10, 244.
- 84 Disch, above n 82, 49.
- 85 Arendt, above n 10, 244.
- 86 Disch, above n 82, 52.
- 87 Fagenblat, above n 44, 28.
- 88 Ibid 28.

- 89 Dodson, 'After the Apology', above n 24, 21. See also Behrendt, *The Apology One Year On ...*, above n 36.
- 90 Dodson, 'After the Apology', above n 24, 20.