

PROTECTING THE RIGHT TO BE A ‘BIGOT’ IN THE WAKE OF THE ‘APOLOGY TO AUSTRALIA’S INDIGENOUS PEOPLES’

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The recent debate over the Abbott government’s proposed amendments to the Racial Discrimination Act 1975 (Cth) raise pertinent questions about Australian values and the Australian national identity. In support of the amendments and the right to free speech they were intended to protect, Attorney-General George Brandis unashamedly declared our right to be bigots. But is this a right worth protecting in Australian law? In the absence of a bill of rights, the issue becomes one that may only be resolved by reference to prevailing social values. As it will be contended in this article, official apologies made in response to past wrongs could help illuminate the values of the societies in which they are made. In the case of former Prime Minister Kevin Rudd’s ‘Apology to Australia’s Indigenous Peoples’ there was the opportunity for the government to commit to the values of equality and freedom from discrimination — values that are completely at odds with the proposed amendments. The first part of the article examines the main functions of an interpersonal apology and how these functions could translate in political and legal terms and advance the claims of Indigenous peoples for justice. In view of this discussion, the second part of the article examines some of the shortcomings of the Apology. In exploring these aspects of the Apology, the article will consider how they have severely limited the potential of an apology to stimulate change in the treatment of Indigenous peoples and to promote the values of equality and freedom from discrimination in Australia.

I INTRODUCTION

In the last 25 years we have witnessed the rise of official apologies as a popular mechanism used by governments and their leaders in responding to revelations of human suffering caused by injustices of the past. In the year 2008 alone, apologies were delivered in Australia,¹ Canada,² the US³ and Italy.⁴ Though the overall number of official apologies delivered in the last few decades

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¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008 167-71 (Kevin Rudd, Prime Minister) (‘Apology to Australia’s Indigenous Peoples’; ‘the Apology’).

² Canada, *Parliamentary Debates*, House of Commons, 11 June 2008, 6849-51 (Stephen Harper, Prime Minister) (‘Apology to Former Students of Indian Residential Schools’).

³ *Department of Defense Appropriations Act, 2010*, Pub L No 111-118 § 8113, 123 Stat 3409, 3453-4 (‘Apology to Native Peoples of the United States’); Apologizing for the Enslavement and Racial Segregation of African-Americans, HR Res 194, 110th Congress (2008); Concurrent Resolution Apologizing for the Enslavement and Racial Segregation of African-Americans, S Con Res 26, 111th Congress, (2009).

⁴ Berlusconi’s apology to Libya for damage inflicted during the Colonial Era: *Treaty of Friendship, Partnership and Cooperation between the Republic of Italy and the Grand Arab Libyan Popular Socialist Jamahiriya*, signed 30 August 2008, 150 GU No 89 of 17 April 2009 (entered into force 2 March 2009). For

is small by comparison to the vast number of violations that have been committed against humanity throughout history, the extensive attention that these apologies have received in recent times illuminates their importance on the world stage.

However, as significant as these apologies may seem to be at the time they are made, the zeal and conviction with which some are offered and received are often short lived. For instance, it has been six years since the Apology was offered to Australia's Indigenous peoples. At the time it was made it was heralded as a watershed moment in the history of the nation.⁵ Insofar as the Apology was focused particularly on acknowledging the injustice of forcibly removing Indigenous children from their families (which created what is now commonly known as the 'Stolen Generations'), its significance could be said to lie in upholding the principle of equality. This principle had been infringed by the operation of racially based laws and policies that had supported the practice of removing Indigenous children in the first place.

But as time has passed it would appear that this understanding of the Apology has faded in the collective memory of the nation. This seems no more obvious than in the recent debate over proposed amendments to the *Racial Discrimination Act 1975* (Cth) ('*RDA*') that would have weakened the protection provided to racial minorities from actions that are 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate ... because of ... race, colour or national or ethnic origin'.⁶ The amendments had been proposed by the Abbott government in 2014 and were a direct response to the successful civil action claim brought in 2011 against journalist Andrew Bolt for breaching the *RDA* when he published disparaging comments about a number of prominent Indigenous individuals.⁷ Though Prime Minister Tony Abbott has recently

the full text of the treaty in Italian, see 'Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008', *Atti Parlamentari*, Camera dei Deputati, 2041/XVI (presented to the Parliament on 23 December 2008).

⁵ Adam Gartrell, "'New Era' Dawns After Indigenous Apology' *The Sydney Morning Herald* (online), 13 February 2008 <<http://news.smh.com.au/national/new-era-dawns-after-indigenous-apology-20080213-1rv4.html>>; 'Kevin Rudd's national apology to Stolen Generations' *News.com.au* (online), 13 February 2008 <<http://www.news.com.au/national-news/pm-moves-to-heal-the-nation/story-e6frfkw9-1111115539560>>.

⁶ *Racial Discrimination Act 1975* (Cth) s 18C(1)(a)–(b).

⁷ Jessica Wright, 'George Brandis to Repeal "Bolt Laws" on Racial Discrimination' *The Sydney Morning Herald* (online), 8 November 2013 <<http://www.smh.com.au/federal-politics/political-news/george-brandis-to-repeal-bolt-laws-on-racial-discrimination-20131107-2x50p.html>>. *Eatock v Bolt [No 2]* (2011) 284 ALR 114 ('*Bolt Case*'). Notably in that case the Federal Court declared that Bolt had infringed s18C by imputing in his publications that (at 127):

(i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

(ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

Moreover, Bolt had failed to prove that what he had written about the applicants was reasonable and in good faith according to s18D of the *RDA*. The relevant provisions in s18D state that:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

...

taken the amendments 'off the table' in response to community concerns,⁸ if they had become law, the new provisions would have made it difficult for Indigenous peoples and other racial minorities to succeed in making claims, like the one made in the *Bolt Case*, in the future.⁹

(c) in making or publishing:

...

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

⁸ Emma Griffiths, 'Government Backtracks on *Racial Discrimination Act* 18C changes; Pushes Ahead with Tough Security Laws', *ABC News* (online), 6 August 2014 <<http://www.abc.net.au/news/2014-08-05/government-backtracks-on-racial-discrimination-act-changes/5650030>>. See also James Massola and Mark Kenny, 'George Brandis Forced to Rethink *Discrimination Act* Changes' *The Sydney Morning Herald* (Sydney), 28 May 2014, 1.

⁹ Originally the government had proposed to repeal s18C. But in response to community lobbying the government decided to amend the section: Bernard Keane, 'Racial Discrimination Act: Brandis Moves to Amend — Not Repeal — 18C', *Crikey* (online), 25 March 2014 <<http://www.crikey.com.au/2014/03/25/racial-discrimination-act-brandis-moves-to-amend-not-repeal-18c/>>. In the proposed Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) (Exposure Draft), the government proposed to amend to ss 18C and 18D of the *RDA* as follows:

Section 18C is repealed.

Sections 18B, 18D and 18E are also repealed.

The following section is inserted:

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely:

(i) to vilify another person or a group of persons; or

(ii) to intimidate another person or a group of persons, and

(b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.

(2) For the purposes of this section:

(a) vilify means to incite hatred against a person or a group of persons;

(b) intimidate means to cause fear of physical harm:

(i) to a person; or

(ii) to the property of a person; or

(iii) to the members of a group of persons.

(3) Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.

(4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

The effect of the changes would have been to narrowly define prohibition of racist speech by removing the protections against offending, insulting or humiliating groups or individuals on the basis of race, colour or national or ethnic origin. Only acts that are reasonably likely to vilify (defined as inciting hatred) or intimidate (defined as causing fear of physical harm) on the basis of race, colour or national or ethnic origin would have been unlawful. At the same time the proposed amendments would have broadened the exceptions allowing vilification or intimidation if it is 'in the course of participating in the public discussion'. Shadow Attorney-General Mark Dreyfus criticised the proposed exception claiming:

One could drive a truck through that provision ... It is a provision of such breadth that just about anything ... said in the course of a public discussion ... would come within this exception to the prohibition, meaning that what we're left with is something of very little meaning.

Emma Griffiths, 'Racial Discrimination Act Amendment: Federal Government Leaves Open Possibility of Altering Proposed Changes', *ABC News* (online), 26 March 2014 <<http://www.abc.net.au/news/2014-03-25/racial-discrimination-act-changes-george-brandis/5343464>>.

The proposed amendments to the *RDA* and the responses they garnered raise pertinent questions about Australian values and the Australian national identity. In support of the amendments and the right to free speech they are intended to protect, Attorney-General George Brandis unashamedly declared that '[p]eople do have the right to be bigots'.¹⁰ But is this a right worth protecting in Australian law? In the absence of a bill of rights, the issue becomes one that may only be resolved by reference to prevailing social values. As will be contended in this article, official apologies made in response to past wrongs could help illuminate the values of the societies in which they are made. In Australia this could have meant that the government's proposed changes to the *RDA* were completely at odds with the Apology, to the extent that it was aimed at upholding the value of 'human decency', the notion of the 'fair go' and the principle of equality that such a notion implies.¹¹ However, making that claim would be to assume that the Apology was *actually* aimed at upholding the values of equality and freedom from discrimination, signalling the end of laws and policies that support the racial discrimination of Indigenous peoples. It is dubious whether such an assumption can be made, especially when we consider that, at the time former Prime Minister Kevin Rudd delivered the Apology, the *RDA* had been suspended as part of the Northern Territory Intervention.

The fact that Australian law could continue to be used to support discriminatory policies and practices against Indigenous peoples raises troubling issues about the role of the Apology and the way that government apologies made in settler-colonised nations function generally. As will be argued in this article, apologies should convey 'other-oriented moral regret' to those to whom they are addressed and, if not already in place, the making of an apology should lead to the introduction of measures aimed at overcoming past injustices and ensuring against their repetition in the future. In particular, an official apology to Indigenous peoples would acknowledge that discriminatory laws and policies, legitimised on the basis of their supposed racial inferiority were wrong and have caused immense suffering and innumerable harms to them. Colonisation and the implications that foreign settlement has had for their sovereignties, the maintenance of their laws, customs and traditions, and their connections to land, family, language and culture, would be among the range of harms acknowledged in an apology. In accepting responsibility for these harms, an apology would uphold the principle of equality and commit to ensuring the equal protection of Indigenous peoples before the law and the protection of their rights as Indigenous peoples. Reconciliation in settler-colonised nations such as Australia would depend on the maintenance of these commitments in the future.

The first part of the article examines the main functions of an apology as understood in moral philosophy and how these functions could translate in political and legal terms and advance the claims of Indigenous peoples for justice. In view of this discussion, the second part of the article examines some of the shortcomings of the Apology. In exploring these aspects of the Apology, the article considers how they have severely limited its potential to stimulate change in the treatment of Indigenous peoples and to promote the values of equality and freedom from discrimination in Australia.

¹⁰ Commonwealth, *Parliamentary Debates*, Senate, 24 March 2014, 1797 (George Brandis, Attorney-General).

¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008 169 (Kevin Rudd, Prime Minister).

II WHAT IS AN APOLOGY AND WHAT DOES IT DO?

A *The Interpersonal Apology*

Discussions about apologies often start by recounting the genesis of the modern-day act of apologising as a speech act which is constituted by the expression of sorrow in response to a wrong.¹² For instance, sociologist Nicholas Tavuchis' influential work in the field classified an interpersonal apology as a 'speech act' whereby the speaker expresses sorrow and regret for moral wrongdoing and seeks forgiveness from the wronged party.¹³ In his view, the sincere expression of sorrow is essential for making a genuine interpersonal apology.¹⁴ In making a genuine apology the relationship between the parties may be restored. The 'wider social web' in which the parties are enmeshed may also benefit from an apology.¹⁵ Essential to achieving these ends is forgiveness. According to Tavuchis, a striking feature of an apology is its power to inspire forgiveness on the part of the person wronged: 'the helpless offender, *in consideration for nothing more than a speech*, asks for nothing less than the conversion of righteous indignation and betrayal into unconditional forgiveness and reunion'.¹⁶ Notably, according to this understanding of the workings of an apology, the victim is positioned as the central figure of the apology. Only the victim can decide whether to forgive or not, and it is not always certain that an apology will be greeted with forgiveness. According to Martha Minow, an apology

grants power to the victims, power to accept, refuse or ignore the apology. The victims may in addition seek punishment, offer forgiveness, or conclude that the act falls outside domains eligible for forgiveness. In any of these instances, the survivors secure a position of strength, respect, and specialness.¹⁷

To apologise, Govier claims, involves a shift in power. The 'one who had power to harm is now opening himself or herself to the other', leaving him or her 'vulnerable to the responses of the other'.¹⁸ Forgiveness then should not be understood as mandated by an apology. However, insofar as it is held up to be the ideal response, the question becomes one of just how forgiveness can be achieved?

As Govier and Verwoerd have explained, if an apology is to work its power and achieve 'forgiveness and a restored relationship between two parties',¹⁹ it would essentially be by making *moral amends*: 'To make moral amends, we may apologize, expressing *other-oriented moral regret* and appealing for forgiveness from the person whom we have injured'.²⁰ A sincere 'I'm

¹² Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991) 22, 109; Trudy Govier and Wilhelm Verwoerd, 'The Promise and Pitfalls of Apology' (2002) 33 *Journal of Social Philosophy* 67, 68.

¹³ Tavuchis, above n 12, 22.

¹⁴ *Ibid* 109.

¹⁵ *Ibid* 13; see also Jean-Marc Coicaud, 'Apology: A Small Yet Important Part of Justice' (2009) 10 *Japanese Journal of Political Science* 93.

¹⁶ Tavuchis, above n 12, 35 (emphasis in original).

¹⁷ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998) 115 (citations omitted).

¹⁸ Trudy Govier, *Taking Wrongs Seriously: Acknowledgment, Reconciliation, and the Politics of Sustainable Peace* (Humanity Books, 2006) 70.

¹⁹ Govier and Verwoerd, above n 12, 68.

²⁰ *Ibid* (emphasis in original).

sorry' expressed by the wrongdoer may evoke 'an emotional shift from resentment to acceptance on the part of the victim', creating the conditions for the resumption of the relationship based on 'moral equality'.²¹ Govier and Verwoerd further argue that a sincere 'I'm sorry' is indeed a sign of acknowledgment: first, the offender is acknowledging that the act was wrong and they are responsible for it; second, the offender is acknowledging '*the moral status of the victim(s), the primary person(s) to whom he apologizes*',²² namely, that the victim did not deserve to be ill-treated by the offender; and third, the offender is acknowledging the legitimacy of the victim's feelings of resentment and anger.²³ As Govier and Verwoerd have pointed out:

It is because saying 'I am sorry' or 'I apologize' in this kind of context primarily implies this acknowledgment of the *human dignity and moral worth of victims* as well as *respect for their feeling of resentment* that an effective apology provides reason for an emotional shift toward forgiveness.²⁴

Notably, however, of all the things an apology can do, Govier and Verwoerd place most significance on the power of an apology to 'unsay' the original message of insult.²⁵

No apology can undo a wrongful act. However, an apology can 'unstate' the implicit claim that the wronged person has no moral worth and merits no moral consideration. ... For one who has been humiliated or treated as worthless, such acknowledgment of dignity and human worth is profoundly significant.²⁶

But to succeed in this aim, the offer of an apology would need to be motivated by the offender's empathy with the person wronged and seeing the wrongful actions in the same way. As Govier and Verwoerd have put it:

[A]pology presupposes moral agreement between the wrongdoer and the [wronged person]: *the act or acts were wrong*. By renouncing his own act, the wrongdoer joins the victim in condemning it and others of its kind. One might think here of the wrongdoer as taking the initiative, moving to stand next to the victim so as to look through his eyes at the wrongful actions.²⁷

The remorseful acknowledgment of wrongful acts in an apology has moral value for victims by helping them restore their sense of self-worth and self-respect.²⁸ In return, the victim may become open to forgiving the wrongdoer, improving, if not restoring, relations between them.²⁹ Indeed, though there is no obligation for victims to forgive, they may in fact develop a sense of moral duty to respond positively to the apology and accept it.³⁰

Viewed in this way, the importance of the role of the victim in the apology process comes clearly into view. In making moral amends through an apology, the wrongdoer is seeking the victim's forgiveness. The potential for forgiveness is made possible by the apologise's demonstration of

²¹ Ibid 69; see also Lee Taft, 'Apology Subverted: The Commodification of Apology' (2000) 109 *Yale Law Journal* 1135, 1137.

²² Govier and Verwoerd, above n 12, 69 (emphasis in original).

²³ Ibid.

²⁴ Ibid (emphasis in original).

²⁵ Ibid 72.

²⁶ Ibid 70.

²⁷ Ibid (emphasis in original).

²⁸ Kathleen Gill, 'The Moral Functions of an Apology' (2000) 31 *Philosophical Forum* 11, 16.

²⁹ Coicaud above n 15, 106; Gill, above n 28, 17.

³⁰ Neil Funk-Unrau, 'Potentials and Problems of Public Apologies to Canadian Aboriginal Peoples' (Paper presented at Academic Institute for Interaction Congress, Kitchener, Ontario, 2-4 June 2004), 3.

remorse for the wrong — through the expression of other-oriented regret the victim becomes the primary consideration.

And yet it is important to point out, as some have done, that words alone may not be enough to appease the victim. Even the most sincere ‘I’m sorry’ will not be the end of the matter. Particularly in cases of serious wrongdoing an offer of repair has also been considered a necessary component of an apology.³¹ As Govier and Verwoerd have observed, any attempt at making moral amends must be supported by ‘practical amends’ if wrongdoers are to really *mean* they are sorry.³² An apology that is not backed by concrete measures of reparation would, at best, seem hollow and insincere and, at worst, likely add further insult to the original wrongdoing. So understood, an apology is more than a speech act if by that phrase it is understood as a ‘one-off’ event. Instead, an apology may be better understood as initiating a process of transformation that will extend into the future. As Govier has explained, an apology ‘looks *backward* to what has been done and *forward* to commitment to reform, practical amends, and a better relationship’.³³ Thus, in summary, the central aspects of a ‘full-fledged moral apology’ are: ‘*acknowledgment* to the person harmed that one is responsible for doing something that was wrong, the expression of *sorrow*, and a commitment to reform and practical amends’.³⁴ The sincere acknowledgment and acceptance of responsibility for past wrongs, and the promises for reform and forbearance in the future are the key elements of a moral apology.³⁵

B *The Political Apology*

Turning now to consider official apologies made by governments for past injustices, it is not uncommon to find analyses of interpersonal apologies (especially of the ‘moral apology’ as discussed above) preceding discussions on official apologies.³⁶ Most notably, the reconciliation of relationships has been identified as a key function of official apologies, as it has been for interpersonal apologies. For instance, in their discussion of group apologies, Elazar Barkan and Alexander Karn hark back to Nicholas Tavuchis’ seminal work in the field to illuminate how political apologies — ‘these delicate “speech acts”’ — ‘could repair damaged social relations and allow the parties to past injustices to go on with their lives’. In their view, an apology may help bridge the gap ‘between the victim’s need for acknowledgment and the perpetrator’s desire

³¹ This is a conclusion that has been reached in the research across the social sciences and the humanities. See Steven J Scher and John M Darley, ‘How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act’ (1997) 26 *Journal of Psycholinguistic Research* 127; Govier and Verwoerd, above n 12, 72; cf Taft, above n 21, 1140.

³² Govier and Verwoerd, above n 12, 72.

³³ Govier, above n 18, 69 (emphasis in original).

³⁴ Ibid (emphasis in original).

³⁵ These appear to be the central elements of an interpersonal apology. However, different researchers have found some variation in the sorts of things that can be included in an apology. Compare Govier, above n 18, 68–9; Gill, above n 28, 12–15; Nick Smith, *I Was Wrong: The Meanings of Apologies* (Cambridge University Press, 2008) 140–2.

³⁶ See generally, Coicaud, above n 15; Gill, above n 28; Govier, above n 18, ch 4; Govier & Verwoerd, above n 12; Smith, above n 35; Tavuchis, above n 12; cf Danielle Celermajer *The Sins of the Nation and the Ritual of Apologies* (Cambridge University Press, 2009); 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* (University of Pennsylvania Press, 2008) 31.

to reclaim his humanity'.³⁷ Furthermore, they have claimed that the sincere expression 'I'm sorry' in an official apology may be appropriate in cases where conflict, distrust and misunderstanding can continue to impede the development and maintenance of co-operative partnerships. As they have argued:

A sincere expression of contrition, offered at the right pitch and tenor, can pave the way for atonement and reconciliation by promoting mutual understanding and by highlighting the possibilities for peaceful coexistence. ... By approaching their grievances through a discourse of repentance and forgiveness, rivals can explore the roots and legacies of historical conflict as a first step toward dampening the discord and frictions they produce.³⁸

The effects could be far-reaching: '[i]n the best cases, the negotiation of apology works to promote dialogue, tolerance, and cooperation between groups knitted together uncomfortably (or ripped asunder) by some past injustice'.³⁹

Similar to the way that interpersonal apologies can function, it is evident that in Barkan and Karn's view a sincere expression of remorse in response to past wrongs in an official apology can engender mutual healing between groups, inspiring forgiveness amongst victims and reconciliation of the relationships between victims and wrongdoers. Support for these claims can be found in the responses of Indigenous peoples to the Apology in Australia. Stolen Generations survivor, Murray Harrison, remarked: '[i]t's been absolute closure. I was taken when I was 10... This apology was something I really needed to hear'.⁴⁰ Similar sentiments were expressed in Canada in response to Prime Minister Harper's Apology to Former Students of Indian Residential Schools. For instance, prominent Residential School survivor, Willie Blackwater, wept through much of the 10 minute speech made by Harper: "If I am able to forgive my perpetrator, I can forgive Canada", Blackwater said after the apology he felt was sincere and very moving'.⁴¹

³⁷ Elazar Barkan and Alexander Karn, 'Group Apology as an Ethical Imperative' in Elazar Barkan and Alexander Karn (eds), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, 2006) 3, 5.

³⁸ Ibid 7.

³⁹ Ibid.

⁴⁰ Jens Korff, 'Sorry' Apology to Stolen Generations (18 April 2014) Creative Spirits <<http://www.creativespirits.info/aboriginalculture/politics/sorry-apology-to-stolen-generations>>.

⁴¹ Juliet O'Neill and Tobin Dalrymple, 'Aboriginal Leaders Hail Historic Apology', *The Vancouver Sun* (online), 11 June 2008 <<http://www2.canada.com/vancouversun/news/story.html?id=18133d91-b8aa-4f8e-956e-20298d79c1d5>>. Willie Blackwater is best known for speaking out with other residential school survivors about the rape and beatings he suffered as a child at the Port Alberni Residential School on Vancouver Island in British Columbia. These revelations led to the criminal conviction of his former dormitory supervisor Arthur Plint who was sentenced to 11 years imprisonment: *R v Plint* [1995] BCJ No 3060. Civil proceedings in the Supreme Court of Canada were subsequently brought by a number of former students of the Alberni Residential School. Though Plint was named as a defendant, the main issue turned on whether damages for sexual assault should be apportioned between the United Church and the federal government. The Court ultimately found the federal government wholly responsible for these harms: *Blackwater v Plint [No 1]* (1998) 52 BCLR (3d) 18; *Blackwater v Plint [No 2]* (2001) 93 BCLR (3d) 228; *Blackwater v Plint [No 3]* (2003) 235 DLR (4th) 60; *Blackwater v Plint [No 4]* (2005) 258 DLR (4th) 275. See Jim Miller, 'The Alberni Residential School Case: *Blackwater v Plint*' (2001) 5(12) *Indigenous Law Bulletin* 20.

And, like interpersonal apologies, the effects of official apologies may extend beyond the individuals involved and be felt throughout the broader community. An official apology delivered at the right pitch may soften the broader public's attitudes towards victim groups and vice versa. Indeed, the potential of official apologies to assist in promoting reconciliation is of particular importance in settler-colonised nations as far as race relations between Indigenous and non-Indigenous peoples are concerned. As Lise Balk King has observed in response to the Apology to Native Peoples of the United States, which was signed into law by US President Barack Obama in 2009, an apology 'could provide a much-needed shift in public attitudes toward tribes in the country, as well as attitudes of Native people toward the federal government'.⁴²

But, in spite of the overlap in understanding of how interpersonal and official apologies can function, many factors have been identified that can make them distinct from one another, leading some to question the extent to which analyses of interpersonal apologies can effectively enhance our understanding of state apologies.⁴³ As will become clearer below, their differences are explicable in terms of the functions they serve: the *moral* functions of an interpersonal apology on the one hand and the *political* functions of a state apology on the other. In this sense, the value of official apologies rests on the functions they serve to enhance the political life of the nations in which they are made.

In examining the political aspects of official apologies it is first important to recognise that they are made in the political context where both the 'apologiser' and 'apologisee' are collective subjects. The apology itself is responding to a public wrong or wrongs committed against specific members of a group in the past.⁴⁴ As a public act, the political nature of the apology has implications for the nation as a whole. In this respect the potential scope of the functions of a state apology could extend further than that of an interpersonal apology: not only relationships but the histories of entire nations are at stake. As Kathleen Gill has noted, these apologies have 'a role to play in the struggle to create history, to establish a certain version of events as the "official story"'.⁴⁵ Others have gone so far as to claim that we live in 'a time that seeks to establish political truth ... [and] apology has become the West's own version of a truth commission'.⁴⁶

Thus, if one of the functions of a state apology is to promote reconciliation, that may be as much about improving relationships marred by conflict as it is about reconciling the perpetration of past injustices in the present history of the nation.⁴⁷ An apology for past injustices serves as acknowledgment of those injustices. As Tavuchis remarked, the 'principle function of [a

⁴² Lise Balk King, 'A Tree Fell in the Forest: The US Apologized to Native Americans and No One Heard a Sound', *Indian Country Today Media Network* (online), 3 December 2011 <<http://indiancountrytodaymedianetwork.com/opinion/a-tree-fell-in-the-forest%3A-the-u.s.-apologized-to-native-americans-and-no-one-heard-a-sound-65750>>.

⁴³ See generally, Celermajer, above n 36; Smith above n 35; Thompson above n 36.

⁴⁴ Celermajer, above n 36, 14–5.

⁴⁵ Gill, above n 28, 22.

⁴⁶ Rhoda E Howard-Hassmann and Mark Gibney, 'Introduction: Apologies and the West' in Mark Gibney et al (eds), *The Age of Apology: Facing up to the Past* (University of Pennsylvania Press, 2008) 1, 1.

⁴⁷ Robert R Weyeneth, 'The Power of Apology and the Process of Historical Reconciliation' (2001) 23(3) *Public Historian* 9.

collective apology] has little, if anything, to do with sorrow or sincerity but rather with putting things on a public record'.⁴⁸ In that regard, the official acknowledgment of historic injustices in a state apology may contribute to reconciling the past in the present and correct the historical record of a nation.⁴⁹ Interconnected with this function is a state apology's ability to raise awareness in the general population of the facts of history as those who have suffered harm experienced them. Present generations of the survivors of historic injustices may also feel vindicated when their understanding of historical events — their truth about history — is officially honoured in an apology.⁵⁰ As Jan Löfström has claimed: 'historical apologies for the previously unacknowledged suffering are to the victims a confirmation of their symbolic inclusion in the (national or other) community — their painful memories are institutionally incorporated in "our shared memory" and "our history"'.⁵¹

However, it has generally been accepted that an official apology should not merely function to correct the historical record. And, if all that an apology did was raise awareness of events in a nation's history that up until that time had been repressed within the nation's collective memory then an apology may not be an appropriate gesture. Public statements of acknowledgment of these events would adequately fulfil this function.⁵² Given the severity of the wrongdoing that these apologies are acknowledging, there can (and should be) more to a public apology than 'putting things on the public record'.

In this respect, it is important to recall that a significant feature of an apology (whether at the interpersonal or political level) is the acceptance of responsibility for the harm done. As Minow put it: '[f]ull acceptance of responsibility by the wrongdoer is the hallmark of an apology'.⁵³ However, this may prove to be the most challenging feature of an apology. In the case of an official apology for historic injustices, the acceptance of responsibility would entail nothing less than the acceptance of trans-generational responsibility for past wrongs, which may not be immediately forthcoming, as the history of the apology movement in Australia shows.⁵⁴ Moreover, the acceptance of responsibility for past wrongdoing implies acceptance of a duty to make amends for any harm caused, giving governments even more reason to resist the calls for an apology as the Australian context also shows. But when these obstacles are overcome the true value of official apologies in contributing to the just resolution of past wrongs may be finally realised.⁵⁵ According to this understanding it is their capacity to do justice which is the basis for

⁴⁸ Tavuchis, above n 12, 117.

⁴⁹ Minow, above n 17, 116.

⁵⁰ Danielle Celermajer, 'The Apology in Australia: Re-Covenanting the National Imaginary' in Elazar Barkan and Alexander Karn (eds), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, 2006) 153, 174–5; Govier, above n 18, 70–1; Minow, above n 17, 114; Melissa Nobles, *The Politics of Official Apologies* (Cambridge University Press, 2008) 36–7; Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4, 6.

⁵¹ Jan Löfström, 'Historical Apologies as Acts of Symbolic Inclusion – and Exclusion?: Reflections on Institutional Apologies as Politics of Cultural Citizenship' (2011) 15 *Citizenship Studies* 93, 96.

⁵² Thompson, above n 36, 33.

⁵³ Minow, above n 17, 115.

⁵⁴ See generally Celermajer, above n 50; Thompson, above n 36.

⁵⁵ See generally, Coicaud, above n 15.

their contribution in advancing national reconciliation — not the sincere expression of remorse as is the case for interpersonal apologies.⁵⁶

So understood, an official apology can be viewed as functioning as a measure of reparative justice in accordance with the international norms relating to the making of reparations for gross violation of human rights abuses.⁵⁷ According to these norms, apologies are listed among those measures of reparation aimed at satisfaction and the non-repetition of harm. The way these measures have been separated from the other measures of reparation, such as restitution, compensation and rehabilitation, suggests that each measure fulfils different aims and expectations. As Thompson has claimed, drawing on Govier and Verwoerd's analysis of the 'moral apology': 'apology as part of reparative justice answers to the harm that injustice causes to the dignity of the victims'.⁵⁸

Danielle Celermajer has offered an even broader understanding of the role of apology as a measure of reparative justice that takes account of the political context in which these apologies are being made. In her view, the reparative justice that an apology performs is connected 'to address the damage to the identity of the victim and more broadly the social and political messages about history, identity and right'.⁵⁹ As Celermajer has explained, the inclusion of 'apology' in the list of measures aimed at satisfaction and non-repetition of harm suggests these measures 'operate within the *symbolic* or *discursive* dimension of harm'.⁶⁰ Thus, for instance, providing an official forum for the revision of national history and acceptance of the victims' version of historical facts, which (as noted above) had almost been forgotten in the nation's history, could be understood as one of the *symbolic* or *discursive* effects of making an apology.

However, the significance of Celermajer's observations may relate more to how an official apology could function politically as a discursive strategy for reconceptualising the identities, not only of survivors, but also of the group or institution making the apology and the relationship that exists between them. From the standpoint of victims, an interpersonal apology may, through the demonstration of other-oriented regret, vindicate their moral worth, but a state apology could go further. Understood as a strategy for identity transformation in the sphere of politics, an official apology

makes clear that past treatment of the group never was morally justified. In an official apology, the highest political authorities acknowledge that the culture of the victim group is not now, and never was, morally inferior to that of the offender group. The very identity of the victim group may be reshaped in this process.⁶¹

For Indigenous peoples in particular, a political apology may reaffirm their subjectivity: it legitimises their experience of suffering and being wronged, thereby according them a full

⁵⁶ See generally, Thompson, above n 36; cf P E Digeser, *Political Forgiveness* (Cornell University Press, 2001) 4–6.

⁵⁷ See generally, Richard B Bilder, 'The Role of Apology in International Law' in Mark Gibney et al (eds), *The Age of Apology: Facing up to the Past* (University of Pennsylvania Press, 2008) 13.

⁵⁸ Thompson, above n 36, 34.

⁵⁹ Celermajer, above n 50, 175.

⁶⁰ *Ibid* 174–5 (emphasis in original).

⁶¹ Gill, above n 28, 23.

subject position, as against a history of marginalising and silencing them in the mainstream.⁶² So understood, an apology enacts respect and recognition.⁶³ The acknowledgment of the victim in an apology is an act of respect: the respect shown to the victim in an apology may make up for the disrespect shown to the victim at the time of the wrong.⁶⁴ This recognition may to some extent satisfy their need for justice by addressing the indignity that had been caused by the harm, contributing to change in the way they are perceived (and treated) by government and in public.

In particular with respect to Western nation states and their treatment of ethnic minority groups, wrongdoing against these groups was often legitimised on the basis of Western superiority and the corresponding inferiority — as the Other — of the non-Western cultural groups.⁶⁵ Apologies for wrongdoing committed against these groups would signal that the superiority–inferiority dichotomy is no longer tenable. In the case of Indigenous peoples, an apology for past injustices would signal that it had been wrong to legitimise violent, unequal and racially discriminatory treatment on the basis of their ‘purported cultural deficiencies and racial inferiority’.⁶⁶ An apology for past injustices would mean they can no longer be perceived as the pre-destined victims of natural selection. Instead, Indigenous disadvantage can be directly traced back to the operation of past state policies and laws that were paternalistic and racist, and that looked forward to the day when Indigenous peoples would be eradicated forever.⁶⁷ In this regard, an official apology would link the wrongdoing experienced by victims to the racist political (and legal) culture of the society in which the wrongs occurred.⁶⁸

This could have flow-on effects for race relations in these nations. Specifically, with respect to settler-colonised nations, race relations between Indigenous and non-Indigenous peoples could be completely transformed. When once the state depended on ‘the category of the uncivilised native to affirm its own claim to civil and sovereign legitimacy’,⁶⁹ the revelations of past injustices experienced by Indigenous peoples and acknowledged in an apology could provide a new foundation for the legitimacy of the nation. In these respects, the apology functions as a symbol of political inclusion — of belonging — for those to whom it is being addressed, with the potential of redefining the political membership of the nation.⁷⁰

In theory at least, any scope for change lies in the understanding of apology-making as signalling the acceptance of responsibility for past wrongs, requiring the state to engage in a process of reform and to refrain from repeating the wrongdoing in the future. In accepting responsibility in an apology, the wrongdoer acknowledges and affirms the norms that were breached in causing the harm. In an official apology, the acceptance of responsibility could ‘help reinforce

⁶² Celermajer, above n 50, 176.

⁶³ Ibid 175.

⁶⁴ Thompson, above n 36, 34.

⁶⁵ Will Kymlicka, ‘Introduction’ in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, 1995) 5–6.

⁶⁶ Nobles, above n 50, 29.

⁶⁷ Celermajer, above n 50, 156–62.

⁶⁸ Ibid 168.

⁶⁹ Ibid 161.

⁷⁰ This is the thesis advanced by Melissa Nobles. See generally, Nobles, above n 50.

acceptance of the violated standards' and 'raise the moral threshold' of society more broadly.⁷¹ Specifically with respect to Indigenous peoples it has been argued that 'the apology officially delegitimizes a political cultural norm that says that treating Aboriginal people as less than full citizens and human beings is acceptable'.⁷² So understood, a political apology may lead to 're-covenanting' the nation. According to Celermajer: 'the apology is ... an acknowledgment of a collective failure to live up to an ideal ethical principle and [acts as] ... a performative declaration of a new commitment, a new covenant for *now* and into the future'.⁷³

The apology process can, in turn, lead to reconsideration of the obligations that states have towards Indigenous peoples now that the history of past injustices has been acknowledged in an apology.⁷⁴ In moral terms this would mean that from now on they should be treated with respect as full human beings and valued for their cultural differences. Translated into political terms it would also mean re-evaluating the nation's position on race relations and the individual and communal rights of Indigenous peoples, addressing past and present manifestations of discrimination in law and policy, and ensuring the protection of their cultural rights in the future. Indeed, the understanding of the moral apology as demonstrating other-oriented regret, when translated into the making of a political apology, would entail committing to a course of action whereby Indigenous claims for justice would be upheld. In this regard, the ideal would be for an official apology to signal a break from the past and start a new relationship between Indigenous and non-Indigenous peoples of those nations. An apology is 'the first step' — and not the end — of the process of reconciliation and would require future action if it is to be accepted as a genuine attempt at reconciliation.⁷⁵

Interpreted in this way, the offer of an official apology may be construed as signalling the state's commitment to addressing the claims of Indigenous peoples for justice more broadly. Indeed, this was the understanding conveyed by Indigenous leaders Tom Calma and Patrick Dodson in their official responses to the Apology.⁷⁶ Tom Calma called on the governments across Australia

⁷¹ Roy L Brooks, 'The Age of Apology' in Roy L. Brooks (ed), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York University Press, 1999) 3, 3; Gill, above n 28, 20; Minow, above n 17, 116. See also Celermajer, above n 36.

⁷² Celermajer, above n 50, 176.

⁷³ Celermajer, above n 36, 247 (emphasis in original).

⁷⁴ Nobles, above n 50, 33.

⁷⁵ From the perspective of many members of the Stolen Generations the apology was seen as the first step on a long journey of healing. This was the message conveyed when, on the evening before the apology, candles spelling the words 'Sorry — the first step' were lit on the parliamentary lawn: Stolen Generations Victoria. *Second Step: Engaging Students with the Stolen Generations* (2008), 7 <<http://www.stolengenerationsvictoria.org.au/sitebuilder/careers/knowledge/asset/files/42/secondstep.pdf>>.

⁷⁶ Tom Calma, 'Let the Healing Begin: Response to Government to the National Apology to the Stolen Generations' (Speech delivered at the Member's Hall, Parliament House, Canberra, 13 February 2008) <<https://www.humanrights.gov.au/news/speeches/response-government-national-apology-stolen-generations>>; Patrick Dodson, 'After the Apology' (Speech delivered at the National Press Club, Canberra, 13 February 2008) <<http://www.sisr.net/apo/dodson.pdf>>. Then Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, had been asked to speak on behalf of the National Sorry Day Committee and the Stolen Generations Alliance: the two national bodies that represent the Stolen Generations and their families. In his speech he defined his role as being 'to respond to the Parliament's Apology and to talk briefly about the importance of today's events'. Former Chairman of the Council for Aboriginal Reconciliation, Patrick Dodson, had been invited to speak by the National Press Club.

to implement all of the remaining recommendations contained in the *Bringing Them Home* Report ('*BTH*')⁷⁷ and he called on the federal government to take the leadership role in developing a national process to make this happen.⁷⁸ More specifically, he called on government to commit 'to a partnership with Stolen Generations groups, ... Link Ups and other service providers, with ongoing consultation and participation'⁷⁹ with a view to providing specific assistance tailored to the particular circumstances of those forcibly removed from their families.

In contrast, Dodson drew on the metaphor of turning 'a new page in Australia's history',⁸⁰ which Rudd had used to describe the Apology, as a way of re-imagining Australia 'as a different place'.⁸¹ The new Australia he imagined would be:

[a] place where Aboriginal citizens no longer live in third world conditions. A place where our kids are safe. A place where community rights, of choice, consultation, participation and responsibility matter more than administrative procedures and public sector management guidelines.⁸²

In order to make this imagined world a reality, Dodson called for the adoption of a more holistic approach in addressing the unfinished business in Australia which would provide better protection of citizenship and Indigenous-specific rights across a range of social, economic, political and legal areas.⁸³

In support of their claims, both leaders drew on the power of the Apology in advancing reconciliation and the new beginning it implied. Both of them based the development of this 'new' relationship on a consultative and participatory model where Indigenous peoples would have a legitimate role in the development and administration of Indigenous policies in the future. In this respect, Calma drew on the way the Apology had come about in Australia as providing the model for future dealings between Indigenous peoples and the state. Significantly, in the final lead up to the Apology in Australia, extensive government consultation with Stolen Generations groups had taken place to ensure it was genuine, respectful and meaningful.⁸⁴ Calma identified these discussions as the first steps in the new partnership in working towards the implementation of the reforms as recommended in *BTH*.⁸⁵

Pat Dodson also interpreted the Apology as signalling a marked change in direction for relations in settler-colonised nations. His understanding of the Apology 'as an epic gesture on the part of

⁷⁷ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>.

⁷⁸ Calma, above n 76, 3–4.

⁷⁹ *Ibid* 4.

⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

⁸¹ Dodson, above n 76, 3–4.

⁸² *Ibid* 4.

⁸³ *Ibid* 3–6.

⁸⁴ National Sorry Day Committee, *The Apology to Australia's Indigenous Peoples* (2014) <<http://www.nsd.org.au/events-info/the-apology-to-australias-indigenous-peoples>>. Compare the account by Hugh Mackay, 'It's a Sorry State of Affairs When Forgiveness is Not the Main Objective' *The Sydney Morning Herald* (Sydney), 17 November 2009, 13.

⁸⁵ Calma, above n 76, 2.

the Australian settler state to find accommodation with the dispossessed and colonised',⁸⁶ translated into the need to develop 'public policy that recognises the fact that Indigenous society — which draws on thousands of years of cultural and religious connection to Australian lands — has survived'.⁸⁷ In these respects he drew on the survival of Indigenous cultural traditions, evidence of broader national support for the recognition of Indigenous peoples in the Australian polity, and the Apology itself, as providing the impetus for change and support for the more far-reaching reforms he wanted implemented. Indeed, he referred to the opening of Parliament by an historic Welcome to Country ceremony the previous day as evidence of how Australia's institutions, steeped in the Westminster tradition, can change.⁸⁸ 'I look forward to the Usher of the black rod one day carrying a woman's digging stick, a powerful symbol of sustenance and strength'.⁸⁹

Though he acknowledged that a great deal of work would be needed to make the necessary changes a reality, he took the government's talk of building bridges of engagement and building a national consensus as opening the opportunity for dialogue between government and Indigenous peoples. In dialogue with each other, they would negotiate the terms of their evolving relationship: where the 'appalling historic relationship which is at the heart of today's apology' will, in time, be based on trust, transparency, and the highest principles of integrity.⁹⁰ In these respects he recognised the importance of Indigenous peoples working in partnership with government and the need for support from non-Indigenous Australians 'to address the legacy of our shared history, create pathways to reconstruct Indigenous communities and build a consensus for a lasting settlement between Indigenous people and the Australian nation state'.⁹¹

Notably, in outlining their respective reform agendas, neither Calma nor Dodson spoke in terms of the potential that the Apology could have in inspiring forgiveness. Indeed, in the context of political apologies like those made to Indigenous peoples for past injustices, the possibility of

⁸⁶ Dodson, above n 76, 6.

⁸⁷ Ibid.

⁸⁸ On the day before the delivery of the Apology, Matilda House Williams, Ngamberi-Ngunnawal Elder and a traditional custodian of the land on which the Australian Parliament House stands, addressed members of both Houses of Parliament in the Member's Hall in Parliament House as part of the Welcome to Country ceremony which marked the opening of the 42nd sitting of Parliament in Australia. The Welcome to Country ceremony began when Matilda House, accompanied by her son and grandchildren entered the Member's Hall. The grandchildren handed a message stick to the Prime Minister and House delivered her speech to the members of both houses of parliament. The ceremony was accompanied by Aboriginal and Torres Strait Islander dancers and singers from around the country who were there to celebrate the occasion with the Ngamberi-Ngunnawal traditional owners. Notably, House's interpretation of the Welcome to Country ceremony on this occasion was consistent with the understanding of Calma and Dodson of the Apology as bringing Indigenous and non-Indigenous peoples together:

Prime Minister, my grandchildren have handed you a gift, a message stick, a tangible symbol of today's ceremony. The message stick is a means of communication used by our peoples for thousands of years. They tell the story of our coming together. With this renewed hope, our pride and our strength is refreshed.

Quoted in Gay McAuley, 'The National Apology Three Years Later' (2011) 3 *Australian Studies*, 9
<<http://www.nla.gov.au/openpublish/index.php/australian-studies/article/viewPDFInterstitial/2101/2493>>.

⁸⁹ Dodson, above n 76, 4.

⁹⁰ Ibid 5.

⁹¹ Ibid 6.

forgiveness being granted has been questioned on various grounds.⁹² The position, taken by some, is that forgiveness — if it is to be granted at all — can only be granted by those individuals who have suffered harm.⁹³ This understanding seems clearly apparent when Dodson addressed Stolen Generations survivors in his response: ‘[t]o the children of those who were removed I challenge you to find the courage to forgive but never to forget what was done to your families and to take from their stories the commitment and courage to prevail as proud Aboriginal people’.⁹⁴ Instead of forgiveness, both Calma and Dodson greeted the Apology with gratitude, particularly for the leadership that Rudd had showed in overcoming the challenges that had stood in the way of making it. Dodson expressed his appreciation for the Apology as a ‘courageous and welcome step,’⁹⁵ while Calma expressed his gratitude to Rudd:

Prime Minister, can I thank you for your leadership on this issue. It is far more difficult to try and unite people than to divide them. Your efforts should be praised universally for attempting to create a bridge between the many diverse elements of our society.⁹⁶

The sentiment was echoed by Indigenous peoples in the audience who expressed their gratitude by wearing T-shirts on the day which had the simple message ‘Thanks’ printed on them.⁹⁷

However, the fact that the Apology was received with thanks and not forgiveness is politically significant. The granting of forgiveness could have been interpreted as signalling the end of the matter, which would have undermined claims for additional forms of redress in the future. The effectiveness of this apology (and arguably official apologies more generally) would not then depend on the expression of emotion — the sincerity of the apologiser and the granting of forgiveness by the apologisee — but would be measured by the maintenance of the promises implied in the apology and how they translate into concrete action in the future.⁹⁸ In this respect, reconciliation would not depend on the granting of forgiveness, but on the just resolution of past (and present) wrongs.

In summary, it is evident that, in theory at least, moral and official apologies share common traits. An apology understood as expressing other-oriented moral regret — as seeing the

⁹² Janna Thompson ‘Is Apology a Sorry Affair? Derrida and the Moral Force of the Impossible’ (2010) 41 *Philosophical Forum* 259, 266–7.

⁹³ Jacques Derrida, ‘On Forgiveness’ in *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes trans, Routledge, 2001) 27, 45; cf Trudy Govier, *Forgiveness and Revenge* (Routledge, 2002) 92–5.

⁹⁴ Dodson, above n 76, 3.

⁹⁵ *Ibid* 2.

⁹⁶ Calma, above n 76, 3.

⁹⁷ Image can be found at <http://www.sbs.com.au/news/sites/sbs.com.au.news/files/Krudd_apology_131114_getty.JPG>.

⁹⁸ This was clearly the position adopted by Inuit President, Mary Simon, in response to the Apology to Former Students of Indian Residential Schools in Canada. In a speech in the Senate on the day after that apology was made, Simon remarked:

The Prime Minister, on behalf of Canada and Canadians, also asked us for forgiveness. As individuals, we will all make our own choice in that regard. As leader of the organization representing the Inuit of Canada, I believe that real and lasting forgiveness must be earned. It will only be forthcoming when it is clear that government is willing to act.

Canada, *Parliamentary Debates*, Senate, 12 June 2008, 1505 (Mary Simon, President, Inuit Tapiriit Kanatami).

wrongdoing and the harm that it has caused through the eyes of the victims — would necessitate that the apologising state accept responsibility for harm done and respond in ways that are consistent with victim demands. But, in contrast to a moral apology, an official apology has distinct political functions with potentially far-reaching consequences for the nation and its peoples. Ultimately, if a moral apology aims to (re)unite the parties on the basis of 'moral equality', a state apology to Indigenous peoples would initiate a process that would advance their social, economic, political and legal equality. In this respect, the endpoint of an apology to Indigenous peoples is not usually cast in terms of forgiveness. Instead the fate of an apology, and the process of reconciliation more broadly, would depend on the measures of reform and forbearance implemented in the future to meet the demands of Indigenous peoples for justice.

III THE RIGHT TO BE A 'BIGOT' AND THE FAILURE OF THE APOLOGY TO LIMIT THAT RIGHT

However, words alone can only do so much and whether an apology could accomplish more and initiate concrete legal and political reforms aimed at advancing Indigenous claims for justice remains to be seen. Consider, for instance, Attorney-General George Brandis' defence of the proposed amendments to the *RDA*, claiming that '[p]eople have a right to be bigots'.⁹⁹ No one seemed to have considered the Apology as reason enough to refute this claim. This suggests that there has not been a general acceptance of the understanding of the Apology as 're-covenanting the nation' in Australia, if that phrase is to mean that an apology to Indigenous peoples signals the making of commitments to ending racism and embracing the values of equality and freedom from discrimination.

As a Minister of the Liberal-National Coalition government, Brandis' remark can be explained by his commitment to traditional liberal democratic rights: to protect free speech even when the speech is 'offensive, insulting or bigoted'.¹⁰⁰ His approach may be understood in moral philosophical terms as aiming to protect the 'moral right to do wrong'. Support for this right can be found in the liberal tradition that places utmost importance on the protection of individual rights. The right to do wrong is said to protect individual autonomy and choice. In the exercise of this right a person has a choice to do right or wrong and that choice should be protected from the interference of others.¹⁰¹ However, even liberals accept that this right does not extend to all wrongs. It definitely would not extend to the commission of 'particularly egregious wrongs'.¹⁰²

According to Brandis, the amendments to the *RDA* were defensible because they aimed to get rid of a provision that made it illegal to 'hurt the feelings of others'.¹⁰³ So understood, the scope of s18C went too far in curbing attitudes that should be allowed to be freely exchanged in public. Brandis' basic argument was that the law was an illegitimate interference with the right to free

⁹⁹ Commonwealth, *Parliamentary Debates*, Senate, 24 March 2014, 1797 (George Brandis, Attorney-General).

¹⁰⁰ *Ibid.*

¹⁰¹ See generally, Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 *Ethics* 21, 29.

¹⁰² Orj J Herstein, 'Defending the Right to Do Wrong' (2012) 31 *Law and Philosophy* 343, 347.

¹⁰³ Emma Griffiths, 'Racial Discrimination Act Amendment: Federal Government Leaves Open Possibility of Altering Proposed Changes', *ABC News* (online), 26 March 2014 <<http://www.abc.net.au/news/2014-03-25/racial-discrimination-act-changes-george-brandis/5343464>>. See also, 'Australians have Right to Offend: Brandis' *News.com.au* (online), 24 March 2014 <<http://www.news.com.au/national/breaking-news/australians-have-right-to-offend-brandis/story-e6frku9-1226863467096>>.

speech to insult others — a right that from a liberal perspective falls within the ambit of the right to do wrong.¹⁰⁴ In this regard, Brandis downplayed what was at stake in changing the law — the protection of individuals and groups from actions that are done because of their ‘race, colour or national or ethnic origin’. Members of the Australian community who have been exposed to racism in the past would know all too well that the expression of racist attitudes can cause more than ‘hurt feelings’. Indeed, an important lesson that can be learned from the experience of Indigenous peoples in Australia is how the denigration of their Aboriginality has contributed negatively to their sense of identity, leaving them with feelings of shame and cultural alienation and making it difficult for them to assert their identities as Aboriginal peoples.¹⁰⁵ The same sort of negative attitudes about Indigenous peoples underpinned the laws and policies that Rudd was presumably apologising for in 2008.

But when Brandis declared our ‘right to bigots’ he was evidently unaware that for many in Australia the expression of racist attitudes is a particularly egregious wrong and is not something worth protecting. Indeed, he had previously disparaged anyone who held this view.¹⁰⁶ His approach, grounded in traditional liberal ideology, assumed the existence of an equal playing field in society in which everyone can exercise their right to free speech equally. From Brandis’ point of view, we are all equally capable of expressing our bigoted views (racist or otherwise) in the free market of ideas. However, this understanding does not account for disparity in power that exists in society that laws like the *RDA* are seeking to address. It is particularly blind to the practical effects the amendments would have had in preserving and protecting the interests of the privileged elite (like Andrew Bolt) who have the power and resources to access a range of media to transmit their racist views, while those targeted by the speech would not have the equivalent means to respond.¹⁰⁷

In any event, Brandis’ conservative approach in this instance was not surprising. In putting the amendments forward, Brandis was attempting to fulfil an election promise to repeal the so-called ‘Bolt laws’. Though Brandis claimed that the move was aimed at protecting free speech, the proposed change to the law would have undermined the protection offered to racial minorities by Australian law. In this respect, the promise to change the law can be added to a long list of recent examples that demonstrate the Liberal Party’s poor track record when it comes to recognising and protecting the rights of minorities. One need not look any further than Liberal Party policies on Indigenous issues — the amendments to the *Native Title Act 1993* (Cth) in 1998, the abolition of ATSIC in 2004–05, the introduction of the Northern Territory Intervention, the vote against the *Declaration on the Rights of Indigenous Peoples*¹⁰⁸ in 2007, and the refusal to apologise to Indigenous peoples throughout John Howard’s term as Prime Minister — to gain an insight into

¹⁰⁴ Herstein, above n 102, 344.

¹⁰⁵ This has been well-documented with respect to the Stolen Generations. See Human Rights and Equal Opportunity Commission, above n 77, ch 11. Indeed, the articles by Andrew Bolt where he disparaged ‘fair-skinned’ Indigenous peoples also illuminate these issues well.

¹⁰⁶ George Brandis, ‘In Defence of Freedom of Speech’ (2012) 56(10) *Quadrant* 21.

¹⁰⁷ Andrew Lynch, ‘Brandis, Bigotry and Balancing Free Speech’, *The Age* (Melbourne), 26 March 2014, 20.

¹⁰⁸ *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007).

the Liberal Party's poor track record in recognising and upholding the rights of Indigenous peoples in recent years.¹⁰⁹

But what is harder to explain is why those who were opposed to the proposed changes to the *RDA*, and had a better understanding of what was at stake in changing the law, did not respond to Brandis' announcement we have 'a right to be bigots' by citing the Apology and what it says about Australian values and the Australian national identity. As a source for the articulation of national values and aspirations, the Apology could serve as a symbol of Australia's commitment to the values of equality and freedom from discrimination. After the Apology, it could be argued that we do not have a right to be bigoted. Indeed, in the Apology itself Rudd reaffirmed 'a core value of our nation — and that value is a fair go for all'.¹¹⁰ To the extent that 'a fair go' has become the catch cry for the promotion of the rights of minorities and disadvantaged groups,¹¹¹ there is scope for the Apology to be given a similar meaning. However, the fact that no one really articulated this claim in response to the proposed *RDA* amendments may point to the limitations of the Apology itself.

To begin, it could be argued that the Apology was irrelevant to the proposed changes to the *RDA* because the amendments would not only have affected Indigenous peoples but peoples of all racial and cultural backgrounds. The Apology was offered to Australia's Indigenous peoples and not to the many other cultural minority groups that have experienced racial discrimination throughout Australia's history. For instance, in 2011 members of the Chinese community in Australia called on the former Gillard government to apologise for institutionalised race discrimination experienced by the Chinese that had spanned more than 100 years from the time of the gold rush in the 19th century to the end of the White Australia policy in the 20th century.¹¹² However, their calls for an apology have fallen on deaf ears. An apology addressed to Australia's Indigenous peoples does not answer the calls of other oppressed racial minorities for acknowledgment of the harms they have suffered in the past. In that regard, the proposed amendments to the *RDA* may have been better understood as offending the principles of multiculturalism. If enacted, they could have had practical consequences for minority groups by undermining their ability to effectively engage in the political life of the nation.¹¹³

¹⁰⁹ Though Indigenous peoples' views on these issues are diverse, especially with respect to the abolition of ATSIC and the Northern Territory Intervention, the Liberal-Coalition government's response to these issues have been far-removed from any attempt at upholding Indigenous peoples' rights. ATSIC had been an attempt (albeit a failed one) at implementing Indigenous self-determination, but its abolition by the Liberal-Coalition government did not result in strengthening Indigenous self-determination, but in its outright rejection and the introduction of mainstreaming in the delivery of services for Indigenous peoples. The Northern Territory Intervention also garnered a mixed response from Indigenous peoples, however, these reactions do not detract from the general criticism of the Intervention by Indigenous peoples that it was implemented in violation of their human rights: see Northern Territory Emergency Response Review Board, Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *Northern Territory Emergency Response: Report of the NTER Review Board* (October 2008) 8.

¹¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).

¹¹¹ Joanna Shulman, 'A "Fair Go" for All', (2013) 38 *Alternative Law Journal* 2, 2.

¹¹² Esther Han, 'Chinese Australians Call for an Apology', *The Sydney Morning Herald*, 30 June 2011, 3.

¹¹³ Online Hate Prevention Institute, *Proposed Changes to Racial Discrimination Act's S18C re 'Insult' & 'Offend'* (9 November 2013) <<http://ohpi.org.au/australia-potentially-on-dangerous-path-to-undercut-democracy/>>.

Nevertheless, insofar as the motivation behind the proposed amendments to the *RDA* was the *Bolt Case*,¹¹⁴ which involved a number of Indigenous claimants, it could be argued that Indigenous peoples were the main target group of the changes. If enacted, the proposed changes could have made publications like those by Bolt lawful, potentially putting any future acts of public denigration of Indigenous peoples beyond the reach of legal redress. In this context then, the Apology could serve as a reminder of Australia's commitment to end racism against Indigenous peoples. Even so, the main issues for Indigenous peoples that arose from the proposed changes were not framed as contradicting the promises made in the Apology. Instead, the amendments were criticised in broad terms: Patrick Dodson claimed the proposed amendments would undermine reconciliation in Australia and Noel Pearson warned the government that the changes would 'embolden bigots'.¹¹⁵ More specifically, the government was criticised for putting itself in a difficult and contradictory position with respect to the support it had shown for the *RDA* amendments while also supporting constitutional reforms aimed at the recognition of Indigenous peoples.¹¹⁶ At one point, even the head of the Prime Minister's Indigenous Advisory Council, Warren Mundine, 'warned that the debate over race hate laws could derail the push for constitutional recognition of indigenous Australians'.¹¹⁷ Nevertheless, while the amendments to the *RDA* have been construed as incompatible with the movement for constitutional recognition of Indigenous peoples, no similar claim has been made with respect to the amendments and the Apology. This is in spite of the fact that Rudd had foreshadowed constitutional recognition when he delivered the Apology.¹¹⁸

Thus, while the discussion in the previous section seemed to indicate the potential for an apology to Indigenous peoples to serve as a symbol of Australia's commitment to bring discrimination against Indigenous peoples to an end, this potential is yet to be realised. One can only speculate as to why this is so.

Ambiguity in the understanding of the functions of official apologies may provide one explanation. The understanding of official apologies as functioning primarily to 'put things on a public record' could mean that some might only consider their importance in terms of the contribution they can make to correct the historical record. Indeed, for strong supporters, the Apology may have seemed most significant because of the contribution it made to the resolution of contested issues that existed at the time it was delivered. In that regard, it is notable that, although the Apology was given the title 'Apology to Australia's Indigenous Peoples' and begins by honouring 'the Indigenous peoples of this land, the oldest continuing cultures in human

¹¹⁴ (2011) 284 ALR 114.

¹¹⁵ Dan Harrison, "'Father of Reconciliation' Patrick Dodson Urges George Brandis Not to Change Race-Hate Laws', *The Sydney Morning Herald* (online), 28 May 2014 <<http://www.smh.com.au/federal-politics/political-news/father-of-reconciliation-patrick-dodson-urges-george-brandis-not-to-change-racehate-laws-20140528-393do.html>>.

¹¹⁶ AAP, 'Indigenous Recognition a Crusade: Tony Abbott' *The Australian* (online), 26 January 2014 <<http://www.theaustralian.com.au/in-depth/australia-day/indigenous-recognition-a-crusade-tony-abbott/story-fnl4gv3e-1226810719979?nk=e253cc448b6cb03bebb011a972b84363>>.

¹¹⁷ Heath Ashton and Michael Gordon, 'Community Groups Reject Brandis Race Hate Reform', *The Sydney Morning Herald* (online), 14 May 2014 <<http://www.smh.com.au/federal-politics/political-news/community-groups-reject-brandis-race-hate-reform-20140514-zrcro.html>>.

¹¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).

history',¹¹⁹ it is specifically addressed to members of the Stolen Generations, 'in particular on the mistreatment of those who were Stolen Generations — this blemished chapter in our nation's history'.¹²⁰ In specifically addressing the Stolen Generations, Rudd declared:

We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.

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

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

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.¹²¹

Considering the background to the Apology, its specific references to the injustices experienced by the Stolen Generations seem inevitable. An apology to the Stolen Generations had been one of the 54 recommendations made in *BTH*.¹²² Of these, the recommendation for an apology had generated the most interest and debate among those who supported the idea of an apology, and those who did not. Though many Australians supported the Apology (and Rudd noted in the speech itself that he was fulfilling an election promise in making the Apology that day),¹²³ it was also true that there were others — particularly political conservatives — who were opposed to it. As noted above, former Prime Minister John Howard had been adamant in his refusal to apologise. Though Howard eventually expressed regret about the disadvantage that exists in Indigenous communities, he vehemently opposed the idea that there was anything in Australia's past treatment of Indigenous peoples for present generations of Australians to feel guilty or ashamed about.¹²⁴

Considering the heated debate over a national apology which lasted for more than a decade after the release of *BTH*, the Apology gives the appearance of being a great achievement. As an apology addressed to the Stolen Generations its significance lies in the Australian government finally accepting responsibility for the negative impact that the policy of forcibly removing Indigenous children has had, not only on those who were directly affected by the policy, but also on entire Indigenous families and their communities across Australia. In offering an apology to the Stolen Generations, Rudd effectively presented a version of the historical record which conveyed a strong message to his audience that the state's former support of a regime of forcibly removing Indigenous children from their families was wrong. But, in the context of its immediate history, the Apology was particularly significant because of the way Rudd finally said 'sorry' without any qualifications or excuses. When compared to Howard's staunch opposition to

¹¹⁹ Ibid 167.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Human Rights and Equal Opportunity Commission, above n 77, 284–93.

¹²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

¹²⁴ See especially Commonwealth, *Parliamentary Debates*, House of Representatives, 26 August 1999, 9205–9 (John Howard, Prime Minister).

an apology, Rudd's unequivocal statement 'we say sorry'¹²⁵ in the Apology would have satisfied many supporters that justice had been done.¹²⁶

Nevertheless, as the discussion above revealed, it is generally accepted that there should be more to an apology than saying 'sorry' in addressing victim demands for justice. An official apology provides the opportunity to reaffirm the values underpinning the nation and re-evaluate the obligations owed to those to whom the apology is addressed. In that regard, in order for the Apology to stand as a symbol of Australia's commitment to the values of equality and freedom from discrimination, there would need to be a clear statement to that effect in the Apology. Condemnation of the erroneous racist assumptions underpinning the laws and policies that supported the forced removal of Indigenous children and a commitment to the elimination of racial discrimination against Indigenous peoples in the future could assist in conveying this message in the Apology. However, a textual reading of the Apology reveals an ambiguous understanding of the harms suffered by Indigenous peoples and of the norms those harms infringed.

The first difficulty is the limited way Rudd framed the harms suffered by Indigenous peoples, primarily focusing on the harms suffered by the Stolen Generations as though these injustices are the only ones requiring acknowledgment in an apology for the advancement of reconciliation in Australia. But even with respect to the Stolen Generations, Rudd confined their losses to the impacts on their familial ties and the personal effects of these losses: 'the hurt, the pain and suffering ... the indignity, the degradation and the humiliation these laws embodied'.¹²⁷ By framing their harms in these terms, Rudd avoided mentioning the more serious social and economic costs of the practice of removing Indigenous children: the malnourishment, maltreatment, emotional, sexual and physical abuse and labour exploitation that the children were often exposed to while in institutional care. The abuse and neglect had a cyclical effect: the impact on one generation would be felt on the next as those traumatised by their experiences have often been unable to cope with adult responsibilities such as looking after their own children. Poor health and a lack of both education and employment opportunities have exacerbated these problems.¹²⁸

Furthermore, Rudd's attempt at establishing a shared understanding of the wrongdoing by emotively describing 'the sheer brutality of the act of physically separating a mother from her

¹²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

¹²⁶ Indeed, it could be argued that Howard's refusal to apologise was seen as unjust by non-Indigenous supporters, not only because it was a refusal to acknowledge that the past treatment of Indigenous peoples was wrong, but more pertinently, because his refusal brought shame on the entire nation. As Sara Ahmed has claimed: 'what makes the injustice unjust' is 'not only a sense that "past actions and omissions" have been unjust, but also ... that it has taken the pride away; *it has deprived white Australia of its ability to declare its pride in itself to others*'. Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh University Press, 2004) 112 (emphasis in original).

¹²⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).

¹²⁸ Human Rights and Equal Opportunity Commission, above n 77, ch 11.

children [as] a deep assault on our senses and on our most elemental humanity',¹²⁹ did not sufficiently account for the cultural costs of the removal of children for those Indigenous peoples affected by the policy. The practice of removing children from their families did not only deny these children the love, happiness and support of a stable family life. The practice of removing children often made it impossible for cultural knowledge to be transmitted from one generation to the next. The children were often removed to hostile environments where they were denied knowledge of their Aboriginality or were denigrated because of it.¹³⁰ Indeed, the original intention behind the policy of 'dealing' with the 'Aboriginal problem' was for white Australia to witness the eventual demise of the Aboriginal *race* in Australia. The widely held view was that the Aboriginal race would eventually die out. The removal of Aboriginal children of mixed parentage from their families was to facilitate their assimilation into the white race. In this respect, the removal of Indigenous children was intended not only to break down their connections to their wider familial structures: in breaking down their family ties their culture — their 'native characteristics' as Cecil Cook put it (quoted by Rudd) — would also be eradicated forever.¹³¹ Viewed in this way, the system of removing the children did not only deny Indigenous children the love of their mothers: it was part of a broader process of assimilation, grounded in racist assumptions about the inferiority of Indigenous culture, and focused on the complete elimination of the Indigenous Other.

However, Rudd never explicitly referred to the policy of removing Indigenous children as 'assimilation' or condemned it as genocide.¹³² In this respect he appeared, at most, prepared to

¹²⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 168 (Kevin Rudd, Prime Minister).

¹³⁰ Human Rights and Equal Opportunity Commission, above n 77, ch 11.

¹³¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 168 (Kevin Rudd, Prime Minister). See also, Commonwealth of Australia, *Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities*, Canberra, 21–23 April, 1937, 11 <http://www.aiatsis.gov.au/_files/archive/referendum/20663.pdf>. On that occasion A O Neville, Commissioner of Native Affairs, Western Australia, remarked (at 11):

Are we going to have a population of 1,000,000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there ever were any aborigines in Australia?

¹³² The question of genocide has been highly contested in Australia. The Human Rights and Equal Opportunity Commission found that the removal of Indigenous children was in violation of human rights instruments to which Australia is a party which included the human rights conventions on racial discrimination and genocide (*International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951)). For findings of Australia's breaches of international human rights standards see Human Rights and Equal Opportunity Commission, above n 77, 266–75. However, neither major Australian political party has accepted the claim of genocide made with respect to its Indigenous peoples. During its term, the Howard government rejected the Human Rights and Equal Opportunity Commission finding of genocide outright: see John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, Submission No 36 to Senate Legal and Constitutional References Committee, *Inquiry into the Stolen Generations*, March 2000, 29–32. The Rudd government also rejected the claim of genocide. When asked why he had not used the word 'genocide' in the Apology, Rudd replied that genocide 'has a specific definition in international law and I don't believe [it] is either appropriate or helpful in describing the event[s] as they occurred or ... in taking the country forward': Australian Broadcasting Corporation, 'Tony Jones Talks to Prime Minister Kevin Rudd', *Lateline*, 14 February 2008 (Kevin Rudd) <<http://www.abc.net.au/lateline/content/2007/s2163296.htm>>. In *Kruger v Commonwealth* (1997) 190 CLR 1 the High Court's also rejected the

concede that the operation of the laws and policies were racially discriminatory: ‘[t]he 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’.¹³³ In making this claim, Rudd exposed a serious deficiency in Australian law: ‘put simply, the laws that our parliaments enacted made the stolen generations possible ... The problem lay with the laws themselves’.¹³⁴ However, as Alex Reilly has claimed, ‘[a]t no point does the apology resile from the power of the State to enact laws of removal or its power to enforce them’.¹³⁵ Instead, the Apology may be seen as functioning to confirm the power of the state to pass these sorts of laws and does nothing to ensure against the making of similar laws in the future.

Thus, Rudd’s declaration that ‘for the stolen generations, there was no fair go at all’¹³⁶ did not relate so much to the violation of Indigenous *culture* embodied in the practice of forcibly removing Indigenous children from their families, as it did to the violation of the value of the family as the fundamental social institution for all of humankind.¹³⁷ Moreover, in construing the forced removal of Indigenous children as a moral rather than a legal wrong, Rudd not only maintained the accepted legal position on the lawfulness of the laws authorising the removals,¹³⁸ but he also curtailed the potential role of law in addressing the past injustices experienced by the Stolen Generations and Indigenous peoples more broadly. In this way, Rudd paved the way for introducing the ‘Closing the Gap’ welfare package, and stopped short of introducing meaningful law reform.

In view of this reading of the Apology it is doubtful whether it could serve as a symbol of Australia’s commitment to end racism towards Indigenous peoples. Indeed, in the absence of reforms aimed at meeting Indigenous demands — like the glaring failure of the Rudd government to establish a compensation fund for members of the Stolen Generations — it is

plaintiffs’ claims of genocide. However, for support of the claim of genocide in Australia see generally, A Dirk Moses, ‘Genocide and Settler Society in Australian History’ in A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004) 3, 29–35.

¹³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).

¹³⁴ *Ibid.*

¹³⁵ Alexander Reilly, ‘The Inherent Limits of the Apology to the Stolen Generation’ *University of Adelaide Law Research Paper* 2009-002 (2008), 14 <<http://www.law.adelaide.edu.au/documents/papers/Alex-Reilly-Inherent-limits.pdf>>.

¹³⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).

¹³⁷ Paul Muldoon, ‘Past Injustices and Future Protections: On the Politics of Promising’ (2009) 13(2) *Australian Indigenous Law Review* 2, 4.

¹³⁸ The Human Rights and Equal Opportunity Commission found that many of the harms suffered were the result of actions contrary to the common law (deprivations of liberty, abuses of power, deprivation of parental rights and breach of guardianship rights): Human Rights and Equal Opportunity Commission, above n 77, 253, 255, 257. However, the lawfulness of the removal of Indigenous children was upheld by the High Court in *Kruger v Commonwealth* (1997) 190 CLR 1 and by the Federal Court in *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1. Compare *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136 where the applicant, Bruce Trevorrow, was awarded \$525 000 in damages, including \$75 000 in exemplary damages and \$225 000, in interest for his unlawful removal from his parents. The decision was upheld on appeal: *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331.

unsurprising to find general disillusionment and cynicism underlying attitudes to the Apology since it was made. As one Aboriginal woman succinctly put it one year on after the Apology was made: “[s]orry is just a word”.¹³⁹ Indeed, the entire public apology movement has been dismissed in some quarters ‘as nothing more than a cheap effort at assuaging lingering guilt concerning some misdeeds from the past’, while those who make them can ‘feel morally superior to those who came before them’,¹⁴⁰ and can move on ‘with the warm inner glow that will come with having said sorry’.¹⁴¹ For these critics apologies are symbolic and meaningless gestures which divert attention away from the need for measurable changes to the lives of those who have suffered (and who, like Indigenous peoples, continue to suffer) from the effects of past (and current) wrongs.¹⁴² Understandably, these critics have dismissed official apologies as being seductive, feel-good strategies contrived and promoted by governments to compensate for failing to make appropriate and effective reparations.¹⁴³

Evidently then, if the Apology did not come to mind when Brandis declared our inherent ‘right to be bigots’, it may be because the Apology has not come to be associated with the upholding of the values of equality and freedom from discrimination in Australia. The Apology may be remembered as the day Rudd said sorry to the Stolen Generations. However, it would appear that the reasons why this was important were lost in the politics that surrounded the Apology at the time it was made. An apology to the Stolen Generations could have led to reforms that advanced justice for them and for Indigenous peoples more broadly. Acknowledgment in an apology that it was wrong to forcibly remove Indigenous children on the basis of erroneous assumptions about their race and culture could have implications for other laws and policies relating to Indigenous peoples — and not merely the proposed *RDA* amendments. Indeed, an acknowledgment of this kind could bring into question the entire process of colonisation, legitimised as it was (and is) on racist stereotypes of Indigenous peoples, and thereby unsettle many of the assumptions upon which the legitimacy and pride of the nation rests. But in minimising the extent of harms suffered by Indigenous peoples and confining them primarily to the pain and suffering that the separation of a mother from her child can cause, Rudd successfully undermined the deeper social meanings and political and legal effects the Apology could have. Ultimately, in confining the Apology to these harms, while also appearing to encompass all of the harms suffered by Indigenous peoples, the impression Rudd gave in the Apology was that there was nothing else in the past or present treatment of Indigenous peoples requiring redress. In view of the minimal reforms introduced in its wake, it is no wonder that the Apology has been all but forgotten.

¹³⁹ James Patterson, ‘The Politics of Sorry’ (2009) *Australian Quarterly* 19, 25.

¹⁴⁰ Mark Gibney and Erik Roxstrom, ‘The Status of State Apologies’ (2001) 23 *Human Rights Quarterly* 911, 913.

¹⁴¹ Noel Pearson, ‘When Words Aren’t Enough’, *The Australian* (Sydney), 12 February 2008, 11.

¹⁴² Thompson, above n 36, 32.

¹⁴³ N Mookherjee et al, ‘The Ethics of Apology: A Set of Commentaries’ (2009) 29 *Critique of Anthropology* 345, 358.