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Response and responsibilty

Abstract
One year after the Apology to the Stolen Generations, Richard Mohr asks what we mean by 'responsibility' in the context of a government wishing to redress past wrongs. Looking specifically at the Intervention and the suspension of the Racial Discrimination Act, Richard argues that, for the Apology to have any meaning beyond 2008, it is important that the Commonwealth deliver on the concrete measures recommended in Bringing them Home, and provide Aboriginal and Torres Strait Islander people a guarantee against further racist polices, both now and in the future.

Keywords
Stolen generations, Northern Territory intervention, Little Children are Sacred Report, Prime Minister Rudd

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RESPONSE AND RESPONSIBILITY

Richard Mohr
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> [F]orcible removal was an act of genocide contrary to the Convention on Genocide ratified by Australia in 1949 [which] specifically includes 'forcibly transferring children of [a] group to another group' with the intention of destroying the group.[1]

In support of his motion of apology to the Stolen Generations on 13 February 2008 ('the Apology'), Prime Minister Rudd used the word 'responsibility' four times. He explicitly mentioned *intergenerational*, *mutual* and *national* responsibility. The word was used once in the motion itself, calling for 'mutual responsibility'. The key theme of the Apology was that 'we, the parliaments of the nation, are ultimately responsible' for the suffering inflicted by the laws and policies of child removal.[2] The Coalition's position on responsibility was stated with more candour by Senator Concetta Fieravanti-Wells, who abstained from the vote, than by the leader of the opposition. Her concern was that 'this and future generations will be made financially responsible for past and potentially current actions towards Indigenous Australia'.[3]

A year after the Apology, I would like to analyse certain statements and actions since the opening of the current Federal Parliament on 12 February 2008 that illuminate the notion of responsibility for suffering that is legally inflicted on others. In particular, I would like to consider the extent to which laws passed by parliaments absolve individual members of a community from responsibility. I will consider 'responsibility' as a term that potentially carries with it some implications for both *current* and *future* action. That is, even if it were possible to frame an apology within such a limited framework that it would only refer to past actions and events, surely the notion of responsibility requires that we consider a response, that is to say, how we are to act in the future.

I have chosen to begin my analysis on the day the new Parliament opened, which was the day before the Apology speech, because that brings into focus that day's events outside of Parliament, where thousands of people rallied to oppose the Northern Territory Emergency Response ('NTER'). Mr Rudd was not among the politicians who addressed that rally; his speech the following day, and the reactions to it, was notably silent on the question of continuing responsibility for the NTER. Senator Fieravanti-Wells, in responding to the Apology, did address the issue of ongoing responsibility 'for past and current actions', even though her primary concern was to avoid it. It seems that her reference to 'current actions' was an indirect reference to the subject of those protests: the massive police and military operation the previous Government had mounted in the Northern Territory.

The Intervention introduced a series of measures in an atmosphere of moral

panic in response to the *Little Children are Sacred Report* ('the Report'), which detailed child abuse within Northern Territory Aboriginal communities. The measures included making benefits payments conditional on school attendance, medical examination of all Indigenous children in the Territory and compulsory acquisition of lands held by Indigenous communities under native title. The authors of the Report stated in August 2007 that the Intervention 'does not include acting on any of 97 recommendations they made after a nine-month inquiry into the sexual abuse of Indigenous children'. They were 'devastated' to see 'the troops roll into the Northern Territory'.[4]

The further use of military force to combat child abuse, and a return to the paternalistic policies of the past, indicates that the policies of forced assimilation, dispossession and racial discrimination have returned to Australia. So concerned was the previous Government that the Intervention may be found to be racially discriminatory that it was exempted from the provisions of the *Racial Discrimination Act 1975* (Cth) ('RDA'). It is likely that collective punishment of people of a particular race would be found to discriminate on the grounds of race.[5] Military and para-military responses to allegations of child abuse run dangerously close to reviving previous forcible removal policies.

What is notable is that the Labor Party, initially critical of the Intervention, ultimately supported it in all legislative points. More than a year into the new Government's parliamentary term, it is notable that it has not modified that policy or amended that legislation, despite an earlier commitment to bring it within the purview of the RDA. Larissa Behrendt has criticised the Intervention, and asked, a year ago, what the Government was going to do after the Apology.[6] I would like to propose in this analysis that apologising without addressing any of the concerns over the Intervention shows not only a lack of commitment or follow through, but also betrays some a dangerous lack of attention to the very concerns that led to the Apology in the first place.

Responsibility

Before considering the way in which Mr Rudd dealt with issues of responsibility, I will briefly consider some theoretical issues surrounding law and responsibility. A traditional view sees law as a technique for attaching responsibility. Scott Veitch follows Nicola Lacey in proposing an alternative view of law as a technology of social organisation. That is, Veitch considers that law *disperses* responsibilities to such an extent that it becomes a technology for '*the legitimation of human suffering*'. Law's 'technologies of responsibility', working within the 'broader social forms of power, also provide some of the major resources through which dispersals and disavowals of responsibility in society can occur'. The contrast between the isolated post-Enlightenment individual and the dominance of social institutions produces a 'proliferation of irresponsibilities'.[7] The result is 'the irresponsible mentality', fostered in the individual who is buffetted by illusions of choice and autonomy, but is, in reality, powerless.[8]

The historical dimension to this bleak critique traces changes from ancient Greek conceptions of responsibility, through to the individualisation of the self-conscious 'moral agent' of the Enlightenment. Veitch transposes these into a post-modern world that has been re-populated by 'a plurality of social systems, and their offerings and solutions'. So, if the ancient heroes did not know responsibility because they were playthings of fate and the gods, we moderns fail to respond to those now well-known responsibilities by being tossed about by social systems. But despite the interference of fate and the gods in ancient Greek epics, their notion of responsibility was a 'thick' one, imputing to the actor the consequences of those actions, and bringing with it 'the obligation to compensate or submit to punishment'.[9] This is in contrast to the 'thin', modern idea of responsibility which, Ricoeur proposes, takes no account of the broad issues of moral responsibility, relying instead on a narrow conception of legal responsibility. Being responsible in a purely legal sense allows us to mitigate our culpability and offset our liability through 'technologies of responsibility', among which Veitch includes consumer economy, administrative decision making, accounting and auditing[10] that have replaced the ancient gods. This state of dispersed responsibility calls for a reassessment of law and ethics. Can we imagine a moral actor who is self-conscious but not isolated from others?

Desmond Manderson has drawn the distinction between this thin responsibility to a generalised other, and the relationship of proximity. He insists that law is based in the ethical relationship, the duty of care one owes to a specific 'other'. The arrangements of reciprocity define the boundaries of the self and the other, so that the individual is recognised through his or her reciprocal relations, of gift or contract.[11] Veitch's critique of law's role in the allocation of responsibility finds it fundamentally compromised by a society of nominally free individuals who are disempowered by technologies that disperse responsibilities.

Our responsibilities to others have been mediated by social relations and collectivities. We have many of the characteristics of the Enlightenment individual: we are self-conscious and we recognise our specificity as persons and as legal subjects. Yet, as members of collectivities, we recognise the constraints on our actions, that our free will is not absolute. Let us see how this interplay of responsibility, moral consciousness and legal technologies plays out in the Rudd Government's apology and subsequent responses.

The Apology

The Apology expressly invokes the responsibility of parliaments to absolve any individual of responsibility. As the Prime Minister said:

> We, the parliaments of the nation, are ultimately responsible, not those who gave effect to our laws. The problem lay with the laws themselves.

There can be no question of agency in this account: people who implemented policies of child removal, even those 'protectors of natives' who stand condemned by their genocidal statements quoted by Mr Rudd,[12] were merely 'giving effect' to laws. There is no opening here for inquiries into individual responsibility or culpability, of the sort that motivated South Africa's or Canada's Truth and Reconciliation Commissions.

Mr Rudd did, however, concede that there were certain relevant 'intergenerational responsibilities'. He went on from laying the blame on the laws to refer to the 'many blessings [we like other settler societies have received] from our ancestors, and therefore we must also be the bearer of their burdens as well.' These ancestors and their euphemistically named 'blessings' were not so remote. Mr Rudd pointed out that the policies of child removal continued into the 1970s, when some current members of Parliament were first elected, a period 'well within the adult memory span of many of us'. Yet the language of 'ancestors' and 'memory spans' still manages to deflect responsibility. An 'adult memory span' presumably refers to events in our adult lives, to a period in which we were 'responsible' in a legal sense, in which we were electing responsible parliamentary representatives, some of whom, as Mr Rudd points out, are still sitting in the Parliament.

The Prime Minister referred to another sort of responsibility, that of 'national responsibility', in support of his proposal to develop bi-partisan policies agreed with the opposition. Apart from the fact that this approach was quickly rejected by the opposition, it was hardly one likely to inspire confidence among Indigenous communities and others concerned to pursue respectful, egalitarian policies, given the coalition's record on Indigenous affairs over its eleven year rule. Particularly troubling was the Prime Minister's choice of words for forming a bi-partisan approach. We need, he said 'a kind of war cabinet on parts of Indigenous policy'.[13] The last time the Labor Party and Coalition had joined forces to declare war on Indigenous communities was when they sent the troops into the Northern Territory in 2007.

In all the Prime Minister's rhetoric about the responsibilities of parliaments, the agency of laws ('and not of men', to paraphrase the rule of law doctrine[14]) and the workings of time to allocate to 'ancestors' the 'blessings' we settlers have received from dispossession of others' land, one anecdote stands out. It is the only point at which Mr Rudd personalised the question of responsibility, apology and retribution. In response to his own rhetorical question, 'Why apologise?', Mr Rudd took six of the total 24 paragraphs of his speech to tell the story of Nanna Nungala Fejo, stolen from her family in about 1932.[15] It is a characteristically appalling story of broken families and inhumanity, in which the agency for 'giving effect to those laws' is specifically allocated to 'a truck, two white men and an Aboriginal stockman on horseback cracking his stockwhip'. The Prime Minister's punch line should be quoted in detail:

> As I left, later on, Nanna Fejo took one of my staff aside, wanting to make sure that I was not too hard on the Aboriginal stockman who had hunted those kids down all those years ago. The stockman had found her again decades later, this time himself to say, “Sorry.” And remarkably, extraordinarily, she had forgiven him.

We know nothing of what the white men were doing, though the truck presumably did not drive itself; certainly, it is unlikely that the stockman, whip or no whip, ‘hunted those kids down’ and put them on the truck all by himself. Mr Rudd’s point, of course, is that, even were we to find an agent (and how convenient that this one is Aboriginal), he can now be forgiven. Indeed, he *should* be forgiven because Nanna Fejo forgave him and wanted ‘to make sure the Prime Minister was ‘not too hard on him’. This is a parable of biblical credentials, with sins and sinners, guilt and forgiveness, a scapegoat chosen to bear the guilt of a whole community. With this device the whole question of agency is dispatched, leaving the field open to parliaments, laws and other nameless institutions to act as technologies to disperse responsibility.

Response

What, then, are we to make of an apology that pledges never to repeat past injustices while failing to respond, to allocate responsibility, or to accept responsibility for repetition of such a policy? What are we to make of the pride that so many Australians felt in celebrating that apology? The distress and outrage felt by many Australians over the previous Government’s failure to apologise to the Stolen Generations, and the many spontaneous expressions of apology, indicate a widespread sense of collective responsibility. We respond when faced with the evidence of the unspeakable suffering of Indigenous people, many of them of our own generation. We must assess the adequacy of the response.

The impersonality of law and the overarching power of the Parliament can be seen, as they are by Veitch, to deprive us of personal responsibility. Yet if ethical life is to continue, we must also see ourselves as persons with responsibilities to others. Whether we were duped by the law, the parliament, or, like the ancient Greeks, by the gods, we must still see the consequences of our actions; ‘good intentions’ or institutional imperatives cannot completely absolve us.

Reciprocity, as Ricoeur and Manderson point out, involves recognition of the *between*: this includes the relations between connected persons, persons with a continuity of life experience, be that of suffering and loss of family or of active participation in removing children. Yet whether or not we individually participated in the removal of children, or any of the earlier crimes, we are also connected as inhabitants of the same space, a social and a physical space. To recognise that one is the beneficiary of the alienation of another’s land, which entailed the destruction of many cultures and the denial of their law, is to be disturbed by

profound doubts about the moral foundation of one's own culture, law and well-being.

The Prime Minister's Apology addressed only the first of the actions proposed by the *Bringing Them Home* report. It is worth stressing that, beyond acknowledgment and apology, the report also recommended 'guarantees against repetition, measures of restitution, measures of rehabilitation, and monetary compensation.'[16] A tort which, as Manderson notes, is at the heart of our relationship to the other, cannot simply be swept away by the acceptance of a generalised responsibility. That responsibility has consequences for the other, which must include redress, allocation of responsibility, and reparations. Not only did the Apology fail to address the question of reparations, but the Government's subsequent actions give no confidence that it can – or will – guarantee against repetition of genocidal practices.

The Intervention into Aboriginal communities of the Northern Territory continues to run that risk of repetition. It does this by overturning land rights, by collective punishment of whole communities (exclusively Aboriginal communities) by quarantining of income, by sending in contingents of police and soldiers to 'combat' child abuse. If these actions were, indeed, well intended, and were not racially discriminatory, then at least they would have to be exposed to the test of the RDA. That they are still screened from the operation of that Act indicates a complete lack of responsibility taken for their impact on a race of people. On 13 October 2008, the Minister released the report of the Northern Territory Emergency Response Review Board. While generally supporting the Intervention as a response to a genuine 'national emergency', the Review recommended improved cooperation with Indigenous communities, making the income management scheme voluntary and that all Government actions should 'respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975*'.[17]

While apologising for, and making good on, our responsibilities for past wrongs, we must also look forward; we must properly comprehend the risk of repeating our genocidal past. To continue racist and potentially genocidal policies constitutes an ethical betrayal and a refusal of responsibility. We still possess a language of responsibility; we must use it to try to recognise how we should respond to past injustices and respond ethically and intelligently, rather than with blind belligerence to current and future challenges.

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[1] Human Rights and Equal Opportunities Commission, *Bringing Them Home* (1997) http://www.hreoc.gov.au/education/bth/community_guide/index.html at 22 April 2008.

[2] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, Wednesday 13 February 2008, 170 (Kevin Rudd, Prime Minister) henceforth '*Hansard'*.
[3] Sen. Concetta Fieravanti-Wells, quoted Michelle Hoctor, 'Walkout Explained', *Illawarra Mercury* (Wollongong), 15 February 2008.
[4] Lindsay Murdoch and Katharine Murphy, 'Canberra's NT troop move "devastating"', *The Age* (Melbourne) 6 August 2007, http://www.theage.com.au/news/national/canberras-nt-troop-move-devastating/2007/08/05/1186252546287.html at 21 April 2008.
[5] Desmond Manderson, 'Not Yet: Aboriginal People and the Deferral of the Rule of Law' (2008) 29/30 *Arena* 219, 243-245.
[6] Larissa Behrendt, UTS Speaks, 19 March 2008, http://www.jumbunna.uts.edu.au/research/pdf/UTSSpeaksLarissa.pdf accessed 18 April 2009.
[7] Scott Veitch *Law and Irresponsibility: On the Legitimation of Human Suffering* (2007) 41.
[8] Ibid 55-6.
[9] Paul Ricoeur *Parcours de la reconnaissance: Trois études* (2004) 177.
[10] Veitch, above note 6, 58.
[11] Desmond Manderson *Proximity, Levinas and the Soul of Law* (2006) 183
[12] "The problem of our half-castes … will quickly be eliminated by the complete disappearance of the black race, and the swift submergence of their progeny in the white ..." (Northern Territory Protector of Natives, similar to views of the Western Australian Protector of Natives) quoted *Hansard* above n. 2, 169.
[13] *Hansard*, above note 2, 172.
[14] Restated by Blackburn J. in *Milirrpum v. Nabalco* (1971) 17 FLR 141, 267.
[15] *Hansard* above n. 2, 169.
[16] HREOC, above note 1, Appendices 9.
[17] Northern Territory Emergency Response Review Board, *Report of the NTER Review Board*, 30 September 2008, Australian Government, Canberra, 12.