

COMMENT

APOLOGIES AND THE LEGACY OF AN UNLAWFUL APPLICATION OF *TERRA NULLIUS* IN *TERRA AUSTRALIS*

*Stephen Pitt-Walker**

‘The conquest of the earth, which mostly means the taking it away from those who have a different complexion or who have slightly flatter noses than ourselves, is not a pretty thing when you look into it too much.’¹

INTRODUCTION

The use of the legal fiction, *terra nullius*, as it was erroneously applied to *Terra Australis*, Australia, as a legal doctrine, supported the British colonial power’s right to settle that territory. Since then, many unspoken (as well as acknowledged) acts of structural and direct violence have been perpetrated against the First Nations population in Australia via the imposition, and later ‘reception’,² of the legal system and laws of England, as well as the dominant socio-political system, that represented the British Crown.

February 13, 2020, marked the 12th anniversary of the so-called ‘National Apology’ to First Nations citizens in Australia.³ While the apology particularly focused on the *stolen generations*,⁴ whose lives had been devastated by past

* E-mail: stephen.pitt-walker@live.com.au

¹ Joseph Conrad, *Heart of Darkness* (Amazon Classics, Seattle, 2019, originally published 1902) 6.

² For a summary of how English law was received in Australia, amongst other countries, see BH MacPherson, ‘The Reception of British Law Abroad’ (2007) Supreme Court of Queensland Library, in Wilfrid Prest, ‘The Reception of British Law’ (2008) 29(2) *Adelaide Law Review* 381, 381–4.

³ The ‘national apology’, made on behalf of the Australian Government, was made by the then Australian Prime Minister, Kevin Rudd. See, Australian Government, *Apology to Australia’s Indigenous peoples* (13 February 2008) < <https://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>>.

⁴ Julie Cassidy, ‘Unhelpful and Inappropriate? The Question of Genocide and the Stolen Generations’ (2009) 13(1) *Australian Indigenous Law Review* 114; Julie Cassidy, ‘The Stolen Generations – Canada and Australia: The Legacy of Assimilation’ (2006) 11(1) *Deakin Law Review* 131.

government policies of forcible child removal and First Nations assimilation, it was also more broadly inclusive of other First Nations-related deprivations, insensitivities and discriminations, as well as often genocidal policies and actions.⁵ This prompts, and ought to prompt, a reconsideration of issues regarding the treatment and predicament of Australia's First Nations' citizens and whether the apology was of real, practical value to those aggrieved.

APOLOGY IN THE AGE OF POLITICAL APOLOGIES

In her article *Non-Apology in the Age of Apology*, Aliza Organick observes that Australia, one of four settler states that originally opposed the United Nations Declaration on the Rights of First Nations People (the Declaration), ultimately endorsed it approximately 18 months after its adoption.⁶ This was also approximately 14 months after the 'National Apology' was delivered. She argues that although Australia's apology expressed a measure of regret for past wrongs (and although Australia thereafter endorsed the Declaration) the apology did not embody the requisite features of a formal apology.⁷

Organick's argument is compelling, and this article's central argument aligns with her broad proposition and utilises the elements she proposes that define political apologies. Political apologies have become much more common since the end of the Second World War, to the extent that the period of the past 25 years has become known as 'the age of apology'.⁸ Among other names, political apology has been variously termed state apology, reconciliation apology and collective apology.⁹ Although these all vary in precise scope, relying on Eneko Sanz conception, Organick proposes that a political apology's main identifying features are that they relate to a political issue and are delivered by an appropriate political

⁵ For examples of such policies and actions see, Shireen Morris, 'The Torment of Our Powerlessness: Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41(3) UNSW Law Journal 629; Martin Flynn, 'Aboriginal Interaction With the Criminal Justice System of the Northern Territory: A Human Rights Approach' (1998) UNSW Law TD2; Martin Flynn, 'Genocide: It's a Crime Everywhere, But Not in Australia' (2000) 29(1) University of Western Australia Law Review 59; Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians Through an Access to Justice Lens' (2013/2014) 17(2) Australian Indigenous Law Review 3.

⁶ Aliza Gail Organick, 'Non-Apology in the Age of Apology' (2019) 31 Denning Law Review 149, 155.

⁷ Ibid 156–7.

⁸ Organick (n 6) 151–5.

⁹ Ibid 152.

agent, such as a head of state or head of government.¹⁰ On this understanding, Australia's 'National Apology', delivered by the then Australian Prime Minister, Kevin Rudd, fulfils these first criteria. However, further elements are required to be met before a political apology may claim legitimacy. These are that it must include compensation to the aggrieved party, responsiveness to specific requests of the community and a commitment to change past hurtful behaviours.¹¹ As Organick states, 'an apology that lacks these essential details...[may be] defined as a non-apology...and deemed fundamentally flawed'.¹² It is to these criteria that this article now turns its attention.

Given that, from a pragmatic perspective, the Australian government and population tend to perceive the 'National Apology' as a substantive apology, this article examines whether (even if it is perceived as a formal apology) such apologies of themselves provide effective redress at law, and/or, whether such apologies create normative consequences in either the domestic or international jurisdictions.

The article advances the argument that, *inter alia*, without any accompanying appropriate compensation, putative formal apologies volunteered by nation-state governments (such as that made in Australia) for the mistreatment of their First Nations' citizens fail to reach the threshold of adequacy as a remedy in either domestic or international law. On their own, apologies are inadequate to create normative legal or other consequences. Further, it is proposed that apologies are arguably a way for governments to avoid compensating and/or including First Nations' Peoples. The issues of First Nations Rights, Rights Law, Treaty, Land Rights and First Nations inclusion in the *Constitution* of Australia, while contiguous and relevantly connected, are not examined in detail in this article.

Several governments, including Australia's, have apologised to First Nations persons for harms inflicted by the impost of colonialism. Contrary to views that suggest otherwise, it is proposed here that, while imperfect, the preferable method of redress for past wrongs committed by states' against First Nations Peoples is that adopted in countries such as Canada and New Zealand where tangible compensation has been paid in legal remediation of, and reparation for, the acknowledged wrong doing. In these jurisdictions, governments recognise not

¹⁰ Eneko Sanz, 'National Apologies: Mapping the Complexity of Validity' (The Centre for Peace and Conflict Studies, April 2012) <<http://www.centrepeaceconflictstudies.org/publications/browse/national-apologies-mapping-the-complexities-of-validity/>> 3, 7, cited in Aliza Gail Organick, 'Non-Apology in the Age of Apology' (2019) 31 Denning Law Review 149, 152.

¹¹ *Ibid.*

¹² *Ibid.* 153.

only land rights but also provide pecuniary compensation¹³ for past violations of First Nations rights.¹⁴

It is also suggested that, by parallel circumstance, the German *Bundes* Government appropriately and meaningfully made substantive and effective redress to *Holocaust* victims beyond mere apologies through the payment of monetary compensation to oppressed persons or their heirs. In contrast to the German example, and rebutting a major counter perspective at law, it is proposed that merely saying ‘sorry’ to First Nations Australians has had little practical effect in providing them with redress. Accordingly, it is submitted that apologies serve a negligible purpose in the development of international or municipal law and/or providing normative legal consequences in either jurisdiction.

WHAT ROLE DOES APOLOGY PLAY AS A REMEDY?

In New South Wales (an Australian jurisdiction), apology may be legally defined as ‘...an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter’.¹⁵ Prue Vines argues that if an apology is tendered to an aggrieved person or persons, they are less likely to engage in litigation.¹⁶ Generally, therefore, the normative (measurable or evaluative) consequence of apologies is that once an apology has been given, nothing more needs to be done, even if something more ‘ought’ to be done.¹⁷ As a matter of evidentiary value, this appears to be the principle upon which the

¹³ It is acknowledged that in the instances, such as with members of the stolen generations some compensation has been paid, see NSW Government, Aboriginal Affairs, *Stolen Generations Reparations Scheme and Funeral Assistance Fund* <<https://www.aboriginalaffairs.nsw.gov.au/healing-and-reparations/stolen-generations/reparations-scheme>>.

¹⁴ See for example, *Tsilhqot’in Nation v British Columbia* [2014] SCC 44. In New Zealand, there is an Office of Treaty Settlements which negotiates claims with Maori. For a list of negotiated claims with pay-out values, see Ministry of Maori Development, *Treaty Settlements 2* <<https://www.tpk.govt.nz/mi/a-matou-mohiotanga/business-and-economics/tribal-assets/online/2>>.

¹⁵ *Civil Liability Act 2002* (NSW) s 68.

¹⁶ Prue Vines, ‘The Apology in Civil Liability: Underused and Undervalued?’ (2013) 115 *Precedent* 28.

¹⁷ Here, I share the criticism of legal language used as normative discourse made by Luis Duarte d’Almeida, ‘Legal Statements and Normative Language’ (2011) 30 *Law and Philosophy* 167, 173.

Australian government has relied since its apology in 2008, after which little of real value has been delivered either in terms of compensation or policy reform.

FIRST NATIONS AND THE EFFICACY, OR OTHERWISE, OF APOLOGIES

Notwithstanding the popular rise of the political apology, many First Nations' people have refused to accept apologies, viewing them as governmental publicity opportunities.¹⁸ For example, the leading Canadian First Nations Grand Chief refused to join visiting British Royalty at a symbolic event at which an apology was to be offered. The Grand Chief, leader of 115 Canadian First Nation tribes, described the event as an 'empty-gesture' ceremony.¹⁹ In denouncing this symbolic event, the Chief opined, '[w]ith the deepening poverty of our communities, remembering the murdered First Nations women, girls and the ongoing negligence of First Nations child welfare policies across this country, in good conscience, I cannot participate in [this] ... ceremony'.²⁰

It is apparent that the Supreme Court of Canada, in line with the Grand Chief's statement, equally does not support empty gestures, as it has recognised native title (known as Aboriginal Title in Canada) in a series of cases.²¹ However, in support of the requirement for compensation rather than empty gestures, in *Haida Nation v Minister of Forests*,²² the Canadian Supreme Court went further than the issue of land rights by recognising that there was indeed a broader Crown obligation to First Nations people; the ruling acknowledging that the obligation is sometimes perceived to be a generalised overarching fiduciary one.²³ A reasonable reading of several other Canadian legal authorities indicates that the fiduciary obligation to act honourably towards Indigenous peoples, while unconventional, supports the central argument in this article by creating a requirement for far

¹⁸ Gary Foley, 'Duplicity and Deceit: Rudd's Apology to the Stolen Generations' (2008) 36 Melbourne Historical Journal 1.

¹⁹ Ashifa Kassam, 'Canada First Nations Chief Won't Join UK Royals for "Empty Gesture" Ceremony', *The Guardian* (international), 27 September 2016).

²⁰ Tony Jones, 'Indigenous Leader Boycotts Black Rod Event Attended by Prince William in Protest of Canadian Government', *The Independent* (Canadian edition) 27 September 2016.

²¹ These cases include *Guerin v R* [1984] 2 SCR 335 (Supreme Court of Canada); *R v Sparrow* [1990] 1 SCR 1075 (Supreme Court of Canada); *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (Supreme Court of Canada).

²² [2002] 2 CNLR 212.

²³ Jamie Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Purich Publishing Limited, 2015).

COMMENT

greater recognition of the rights of dispossessed persons than a mere apology without any accompanying compensation.²⁴

As already mentioned, several governmental apologies have been made to First Nation Peoples. For example,

[...] the New Zealand Government has made specific apologies on two different occasions, the Canadian Government has apologised for its role in the administration of special residential schools, the United States Government has apologised for its overthrow of the Kingdom of Hawaii, and the Norwegian King apologised for his state's past policies....²⁵

In respect of these apologies, however, it is proposed that, by example, the apologies made by the New Zealand government would have been relatively ineffectual had they not been accompanied by the award of NZ \$175 million in fishing rights to the *Maori* People, resulting from a commercial settlement reached after the *Treaty of Waitangi (Amendment) Act 1985*. That Act was paramount in empowering the Waitangi Tribunal to hear claims of treaty breaches by the Crown since 1840.²⁶ This ensured that the apology was far more effective than words alone, as it provided compensation, accounted for community aspirations and sought to change past harmful policies.

A MORE EFFECTIVE MODEL

Notwithstanding the restoration of some degree of dignity that may be achieved through an apology, a better form of redress is reflected in that made by various German Governments to victims of the *Holocaust* and their families. This is represented in the Conference on Jewish Material Claims Against Germany. The total global allocations for 2019 from this Tribunal are USD \$564 million, and more than USD \$70 billion has been paid in compensation since 1951. Currently,

²⁴ See *Guerin v R* [1984] 2 SCR 335 (Supreme Court of Canada); *R v Sparrow* [1990] 1 SCR 1075 (Supreme Court of Canada); *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (Supreme Court of Canada).

²⁵ Coral Dow and John Gardiner-Garden, *Indigenous Affairs in Australia, New Zealand, Canada, United States of America, Norway and Sweden* (Australian Parliamentary Library Social Policy Group Background Paper 15, 6 April, 1998) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98Bp15>.

²⁶ Jason De Santolo, 'Responses to the "Sealord Deal" – Fishing for Insights' (2004) 4 *Journal of Indigenous Policy* 49, 52.

this covers in-home care for frail aged persons and monthly pensions.²⁷ Compensation is made to both individuals and organisations that provide food, medicines and other services to survivors.²⁸ Unlike Australia's 'National Apology', this German apology meets the major elements required to declare such an apology legitimate. It is also notable that most of the monies were paid before Germany's Chancellor had delivered an apology to the Jewish People in a speech in the Israeli *Knesset* in 2018. This signifies that redress is more substantively achieved by the payment of compensation than through the delivery of an apology in words alone.²⁹

By comparison, the Australian Government's apology to First Nations persons demonstrates how an apology may be politicised, and by degree hijacked for the purposes of a political agenda, especially when it does not accompany any offer of compensation.³⁰ In such circumstances there is no reason to believe that the apology is anything but an empty gesture. This is borne out in the Australian case by the many failures to deliver meaningful improvement in First Nations people's circumstances through effective engagement and/or policy initiatives.³¹ Consequently, such an apology does not reach the threshold of an effective remedy at law. It follows that, if an apology is not given in unqualified terms and backed by material compensation that provides a practical remedy, it is ineffective. Lending support to this proposition, Gary Foley wrote at the time of the Rudd government's apology in Australia,

[t]he only thing that apologies do as far as I can see, is at the very most... [make admission of] a wrongdoing. Which gives minimal comfort to the wronged. Unless it's accompanied by some sort of meaningful form of compensation or reparations for past wrongs that have been committed, then it is a farce.³²

²⁷ Sarah Levi, 'Claims Conference to Increase Holocaust Survivor Funding By \$87 Million' (*The Australian*, 10 July 2018).

²⁸ ABC, 'Germany to Compensate People Who Fled from the Country as Children to Escape Nazis' (*ABC online*, 17 December 2018) < <https://www.abc.net.au/news/2018-12-17/germany-to-pay-compensation-to-children-who-fled-from-nazis/10628274>>.

²⁹ Anshel Pfeffer and Shahar Ilan, 'Speaking in German, Merkel Gets Standing Ovation in Knesset *Haaretz*' (*English edition, Jerusalem*) 19 March 2008.

³⁰ Foley (n 18).

³¹ For examples of failure to deliver policies and initiatives directed towards improving the circumstances of Indigenous persons see Organick (n 6) 156–7.

³² Foley (n 18).

Foley's position also accords with Organick's view that an apology must contain the elements mentioned earlier in this article to be legitimate, otherwise it may be described as a non-apology.³³ The 'Australian non-apology' was followed in 2017 by the Uluru Statement,³⁴ which called for Constitutional and other forms of recognition, inclusion and policy change in respect of the circumstances of Australia's First Nations Peoples. The rationale for, and drivers of,³⁵ this demand for more than a mere apology, resolved at a 'Constitutional Convention' by elders and leaders of Australia's First Nations Peoples, demonstrates that, absent accompanying compensation, the apology has been ineffective. This supports the central proposition of this article that apologies alone are ineffective and that they, without accompanying compensation, ought not create normative consequences at municipal or international law.

WHY DID THE AUSTRALIAN GOVERNMENT APOLOGISE?

Foley argues that apologies often are made to avoid liability, or at least limit further liability.³⁶ Many apologies are actually made with an express disclaimer of liability, exemplified by the US case examined below.³⁷ Accordingly, while they may make good political pageantry, apologies (absent accompanying compensation and frameworks for implementation) are practically ineffective as a remedy.

In the Australian context, Foley argues that the apology to the *stolen generations* was something that enabled the 'Australian people to pat themselves on the back and delude themselves into thinking that they'd done something significant for the Aboriginal people, which in fact they [had not]'. He generally views apologies as a duplicitous means of appeasing consciences, while delivering little of real value to the aggrieved either domestically or internationally. Apologies, he argues, give both domestic and international stakeholders further excuse for not having expressed concern or acted to remediate the circumstances of the aggrieved parties sooner. This position is echoed in similar terms by Chiara Lawry, who

³³ Organick (n 6) 156.

³⁴ From the Heart, 'The Uluru Statement' (2020). <<https://fromtheheart.com.au/uluru-statement/the-statement/>>.

³⁵ Daniel McKay, Uluru Statement: A Quick Guide (Research Paper, Parliamentary Library, Parliament of Australia, 19 June 2017). <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement>.

³⁶ Organick (n 6) 156.

³⁷ Prue Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27(3) Sydney Law Review 483, 485.

remonstrates at the lack of reparations paid to aggrieved First Nations persons in Australia.³⁸

In support of the above argument, Foley and Lawry use the example of the US ‘apology’ (non-apology according to Organick),³⁹ secreted in s 8113 of the *Department of Defense Appropriations Act 2010* (USA), to demonstrate the meaninglessness of apologies. This provision acknowledges ‘that there have been years of official depredations, ill-conceived policies, and the breaking of covenants... regarding Indian tribes [...together with] many instances of violence, maltreatment, and neglect inflicted on First Nations people by citizens of the [USA]’.

However, the same provision also contains a disclaimer that it neither ‘authorizes nor supports any claim against the [USA]’ by First Nations persons for such acts.⁴⁰ It is submitted that this apology both legislatively deprives the common law right of First Nations people to justice by excluding liability or actions for compensation for acknowledged wrong doing, and, additionally, is an expression of disdain for the First Nations people of the US that undermines the earlier-stated apology.

Besides the restoration of a modicum of dignity, the International Law Commission’s *Draft Articles on State Responsibility*⁴¹ declare that, in addition to payments of compensation for an international wrong, a formal apology may also be offered as satisfaction. The implication being that, as in the above-mentioned German case of compensation being paid prior to an apology being offered to the Jewish People generally and *Holocaust* victims specifically, the apology ought to follow the payment of substantive compensation for it to reach the threshold of an effective remedy at law.

Following this line, George Barrie posits that, pertaining to past wrongs, an apology can formally ‘set the record straight’ where a political acknowledgement is needed and serves as a starting point for new government policies, as evidenced in South Africa post-apartheid.⁴² Nonetheless, whichever follows which, Barrie

³⁸ Chiara Lawry, ‘Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations’ (2010) 14(2) *Australian Indigenous Law Review* 83.

³⁹ Organick (n 6) 164.

⁴⁰ *Department of Defense Appropriations Act 2010* (USA) s 8113 (2)(b).

⁴¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53rd sess, (23 April–1 June and 2 July–10 August 2001), Supplement No. 10 (UN Doc A/56/10).

⁴² George Barrie, ‘Accepting State Responsibility by Means of an “Apology”’: The Australian and South African Experience’ (2013) 46(1) *Comparative and International Law Journal of Southern Africa* 52; this is also referenced by Organick (n 6) 156.

indicates that there is a need for compensation to accompany apologies for them to be effective as a remedy at law.⁴³ As detailed below and noted by Organick,⁴⁴ the Australian example demonstrates the likelihood that new, aspirational or remedial policies are often not pursued post-apology. Therefore, on weight of evidence, the Australian apology, and apologies in general, without accompanying compensation or policy-responsiveness to First Nations community requests, are ineffective as a remedy.

THE FIRST NATIONS EXPERIENCE SINCE THE AUSTRALIAN GOVERNMENT'S APOLOGY

The following examination of Australia's First Nations incarceration rates provides a measure of the circumstances of Australia's First Nations citizens over time, as well as a comparison to First Nations incarceration rates in other jurisdictions. This affords some indicia by which the government may be judged, against its stated aim of improving the circumstances of First Nations Australians.

In 1991, 16 years before the Australian Government's apology, First Nations Australians were less than eight times more likely to be imprisoned than the non-First Nations population. However, five years after the Rudd government's apology, on 30 June 2012, Australian prisons held 29,383 inmates.⁴⁵ First Nations prisoners, at 27 per cent of that total, represented over 10 times their proportion of Australia's overall population.⁴⁶ Accordingly, the proportion of First Nations prisoners to the overall population increased by around 30 per cent between 1991 and 2012,⁴⁷ and 1.9 per cent of the entire Australian First Nations adult population was imprisoned.⁴⁸ Thalia Anthony explains that the input of First Nations elders into the sentencing process during the same period, at least in Australia's Northern Territory, was reduced to the point of virtual nonexistence. She proposes that this

⁴³ Ibid.

⁴⁴ Organick (n 6) 152.

⁴⁵ Australian National Council on Drugs, 'An Economic Analysis for Aboriginal and Torres Strait Islander Offenders: Prison v Residential Treatment' (*Australian National Council on Drugs*, 2013) <<http://www2.deloitte.com/content/dam/Deloitte/au/Documents/finance/deloitte-au-fas-prison-vs-residential-treatment-240914.pdf>> viii.

⁴⁶ Ibid.

⁴⁷ Robert Tumeth, 'Is Circle Sentencing in the NSW Criminal Justice System a Failure?' *Aboriginal Legal Service (NSW/ACT)* 7 June 2011.

⁴⁸ Chief Magistrate Hilary Hannam, 'AIJA Indigenous Justice Conference Current Issues in Delivering Indigenous Justice: Challenges for the Courts', Adelaide, 18–19 July 2013.

deliberate reduction in culturally disposed justice mechanisms contributed to increased rates of incarceration.⁴⁹

Elsewhere, Anthony and co-author Elena Marchetti affirm that First Nations Canadians are over-represented at a nine times greater rate than the overall Canadian population, and New Zealand's Maori Peoples are overrepresented by a factor of 3.5.⁵⁰ Compared to these states' Australia's First Nations population is the most over-represented incarcerated group. Exacerbating this issue, the kinds of innovative approaches to sentencing⁵¹ discussed by Kathleen Daly and Marchetti, published five years after the 'National Apology', have not been implemented and little has been done to create restorative, diversionary paths to ameliorate First Nations over-representation in Australian prisons.⁵² This demonstrates that First Nations Australians are significantly worse off since the apology, as well as being worse off than many First Nations counterparts in other jurisdictions.

POLICY AND FUNDING DIMENSIONS

Intrinsically connected to the above issue is the failure of the Australian government's public policy and spending programs, designed to improve the circumstances of First Nations Australians. As a simple calculation, 27 per cent of the amount spent some eight years ago in Australia's Northern Territory prisons alone amounts to over AUD \$27.5 million.⁵³ An investment of some part of this sum in more appropriately targeted early intervention and diversionary programs⁵⁴ is likely to have delivered the sort of opportunities that relieve the disadvantages that

⁴⁹ Thalia Anthony, 'Two Laws: Indigenous Justice Mechanisms in Context' (2015) 18(1) *Journal of Australian Indigenous Issues* 99, 110–1.

⁵⁰ Elena Marchetti and Thalia Anthony, 'Sentencing Indigenous Offenders in Canada, Australia, and New Zealand', (2016) *University of Technology Sydney Law Research Series* 27.

⁵¹ Diversionary and alternative and/or dual cultural criminal sentencing and management methods.

⁵² Kathleen Daly and Elena Marchetti, 'Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence' in Marinella Marmo, Willem de Lint, and Darren Palmer (eds.), *Crime and Justice: A Guide to Criminology* (4th edn, Lawbook Co 2012) 9.

⁵³ *Australian National Council on Drugs*, (n 43).

⁵⁴ This is foreshadowed by the National Indigenous Reform Agreement, part of the Intergovernmental Agreement on Federal Financial Relations between the Commonwealth, the States and the Territories <http://www.federalfinancialrelations.gov.au/content/npa/health/_archive/indigenous-reform/national-agreement_sept_12.pdf> [7].

lead to poor parenting, domestic violence,⁵⁵ unemployment⁵⁶ and general poverty.⁵⁷ These are all factors that contribute to the over-representation of First Nations persons in the Australian prison system.

In this respect, the *Closing the Gap* report indicates that the amelioration of these difficulties necessitates more than a combination of an apology, un-targeted funding and/or imprisonment.⁵⁸ Australian First Nations Senator, Patrick Dodson, proposes that spending without any clear aims will not solve the above problems, and argues that multi-faceted First Nations inclusion in the polity is required for the amelioration of their circumstances.⁵⁹ This together with appropriate compensation and mechanisms for disbursement are required for a genuine resolution.

The above cycle of disadvantage and ‘structural violence’⁶⁰ is congruent with the arguments expounded by Johan Galtung and later by Don Weatherburn.⁶¹ Extending these arguments, Weatherburn argues that ‘[t]he cure for [disproportionately high First Nations rates of] crime is not a rearrangement of the economic fabric of society alone’.⁶² Rather, it will rely on a ‘rearrangement of

⁵⁵ Tara McGee, Rebecca Wickes, Jonathan Corcoran, William Bor and Jake Najman, ‘Antisocial Behaviour: An Examination of Individual, Family, and Neighbourhood Factors’, Trends & Issues in Crime and Criminal Justice, Research paper No. 410 (Australian Institute of Criminology, 2011).

⁵⁶ John Braithwaite Bruce Chapman Cezary A Kapuscinski, ‘Unemployment and Crime: Resolving the Paradox’, Final report to the Criminology Research Council (Australian National University, 1992)

⁵⁷ This is what Weatherburn and Lind call ‘economic stress’ in Don Weatherburn and Bronwyn Lind, ‘Poverty, Parenting, Peers and Crime-Prone Neighbourhoods’, Trends & issues in crime and criminal justice, Research paper No. 85 (Australian Institute of Criminology, 1998); Diane Smith, ‘Redfern Works: The Policy and Community Challenges of an Urban CDEP Scheme’, CAEPR Discussion Paper No. 99 (Centre for Aboriginal Economic Policy Research, 1995).

⁵⁸ National Indigenous Reform Agreement, (n 52).

⁵⁹ Patrick Dodson, *Launch of the Aboriginal and Torres Strait Islander Social Justice Commissioner’s: Social Justice and Native Title Reports for 2001* (Australian Human Rights Commission 2002).

⁶⁰ David P Barash, *Introduction to Peace Studies* (Wadsworth Publishing 1991) 8–9.

⁶¹ Don Weatherburn, Economic Adversity and Crime, Trends & Issues in Crime and Criminal Justice, Research paper No. 40 (Australian Institute of Criminology, 1992); Don Weatherburn and Bronwyn Lind, Poverty, Parenting, Peers and Crime-Prone Neighbourhoods, Trends & Issues in Crime and Criminal Justice, Research paper No. 85 (Australian Institute of Criminology, 1998).

⁶² Ibid.

the thinking of potential offenders', disrupting the above cycle by investing in early intervention. The statistical analysis above demonstrates that a mere apology has been insufficient to achieve the kinds of early intervention that would have very likely led to a reduction in the proportion of First Nations persons in Australian prisons. In Weatherburn's parlance, this could have been achieved through a 'rearrangement' in the thinking of Australia's First Nations population, via appropriate engagement, early intervention and targeted spending.

NATIVE TITLE RIGHTS AS COMPENSATION

In Australia, Native Title rights which might be perceived by some as an extended form of apology,⁶³ do not, and cannot, constitute compensation. This is because, unlike in Canada,⁶⁴ in Australia, they are not a recognised form of property in the Blackstonian sense. This is despite that compensation can now be awarded for the extinguishment of Native Title on a case-by-case basis.⁶⁵ The concept of property was defined in *Milirrpum v Nabalco*,⁶⁶ as including the owner's '... right to exclude others and the right to alienate'; *apropos* native title does not give an individual the right to exclude or alienate others. Furthermore, the *Native Title Act 1993* does not allow an individual to exercise non-commercial rights.⁶⁷ As such, these features of Native Title in Australia deny First Nations persons effective compensation. It is also worthy of note that some researchers also reject treaties as mechanisms for preserving First Nations rights and access to compensation, arguing that 'treaties, deeds of settlement and agreements (or even clear judicial pronouncements) do not hold secure the rights of First Nations Peoples when such rights remain subject to the [will] of parliament'.⁶⁸

⁶³ Shireen Morris, 'Re-evaluating Mabo: The Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity' (2012) 5(3) *Land, Rights, Laws: Issues of Native Title* 1.

⁶⁴ *Tsilhqot'in Nation v British Columbia* [2014] SCC 44.

⁶⁵ *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (13 March 2019) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁶⁶ (1971) 17 FLR 141, 171.

⁶⁷ *Yanner v Eaton* (1999) 201 CLR 351.

⁶⁸ Jason De Santolo, 'Responses to the "Sealord Deal" – Fishing for Insights' (2004) 4 *Journal of Indigenous Policy* 49, 62; Michael Dillon, *Policy Implications Of The Timber Creek Decision*, Centre for Aboriginal Economic Policy Research ANU College of Arts & Social Sciences CAEPR Working Paper 128/2019.

CONCLUSION

In this article it is contended that only measures that help achieve a 'rearrangement of the thinking' (raising the dignity, pride, independence and self-belief) in First Nations people through the payment of effective compensation will aid in the reduction of the relative disadvantage caused by the damage inflicted by forced colonial subjugation. The notion that any substantive advantage is delivered through ceremonies at which apologies alone are delivered by inheritors of a colonial power structure is rejected. Additionally, policies, treaties and settlements that lack an appropriate framework for implementation, First Nations engagement and involvement in policy making, even when aimed at providing a better family life and socio-economic outcomes for First Nations persons, provide insufficient remedy for those dispossessed by colonialism.

Based on the evidence of the decline in the circumstances of Australia's First Nations Peoples, especially when compared to other First Nations Peoples experiences from outside Australia, it is all but impossible to believe that apologies proffered without accompanying targeted and substantive compensation packages will have anything but negligible practical effect. Specifically, in relation to Australia's 'National Apology', they in fact arguably mislead First Nations and non-First Nations citizens to the perception that something of practical and legal value has been delivered by their government when in fact it has not.

Ultimately, because apologies without any accompanying targeted compensation are ineffective, they should not be regarded as a remedy in municipal or international law, nor do they create normative consequences in the Australian (or international) jurisdiction. The question begging is one of great significance for the Australian political and legal systems, government, electorate and society. Will Australia's *Heart of Darkness* prevail, or will the nation's conscience prove Dr Martin Luther King Jr's dictum that in the long run the arc of history bends towards justice?