OF WORDS AND REALITIES

by Hon Michael Kirby

On 13 February 2008, during the first sitting of the new Australian parliament, after the return of the Australian Labor Party government led by Mr. Kevin Rudd, the Prime Minister rose in Parliament to offer an apology to the Indigenous people of Australia. It was an apology that had been steadfastly refused by his predecessor, Mr. John Howard.

Mr. Howard had disclaimed the very notion of an apology, contending that inter-generational guilt was erroneous and that Australians were not morally responsible for any wrong done to the Indigenous people by earlier generations. Fears were expressed by those in support of Mr. Howard's stance that an apology would open up demands for financial recompense, which could cripple the Australian economy and unjustly enrich some citizens at the cost of others.

The 1997 report by the Human Rights and Equal Opportunity Commission on *The Stolen Generations: Bringing Them Home,* recommended that an apology be given. This went nowhere. Opponents said over and over again that words of regret represented an 'unhelpful simplification' of the wider issues raised in discussions of reconciliation between Australia's first peoples and the descendants of the settlers and later arrivals. So nothing happened.

When he rose to repair the earlier refusal and neglect, Mr. Rudd made a moving speech to the Parliament. It was expressed in powerful and symbolic language. It bore the cadences of Cranmerian language of the *Book of Common Prayer* – one of the signature texts of the English language. Its impact was no doubt the greater because, according to reports, it was written by the Prime Minister himself rather than by a committee of well-meaning officials transfixed by composure. At the heart of the apology was this affirmation:

> The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future. We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss of these our fellow Australians. 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 this inflicted on a proud people and a proud culture, we say sorry.[1]

The words of apology were supported in the following speech by the then Leader of the Opposition, Dr. Brendan Nelson. It was a rare moment of parliamentary unanimity in Australia. It was made the more moving because it had been a long time coming. It followed fierce resistance that somehow melted away, as if overnight, when a new government was elected, the old government was defeated, and the outgoing Prime Minister lost his seat in parliament and was gone.

There are limitations inherent in a national apology. In the first place, it was necessarily expressed in words of generality. In New Zealand great care is taken when apologising to the Maori people to express with detailed specificity and particularity the wrongs for which that apology was offered. Only when this is done, is it considered that a true moral recompense has been provided.

Apologies also involve the mutuality of the relationship between those who give them and those who receive them. As Martha Minow, now Dean of the Harvard Law School, remarked in 1998:

> An apology is not a soliloquy. Instead, an apology requires communication between the wrong-doer and a victim; no apology occurs without the involvement of each party. Moreover, the methods for offering and accepting an apology both reflect and help to constitute a moral community. The apology reminds the wrong-doer of community norms because the apology admits to violating them. By retelling the wrong and seeking acceptance, the apologiser assumes a position of vulnerability before not only the victims but also the larger community of literal or figurative witnesses.[2]

Because complete equality is hard - if not virtually impossible - to achieve, Dean Minow has suggested that apologies are 'inevitably inadequate'. In the case of the Australian apology by Prime Minister Rudd, this element of inadequacy was to be found in the refusal even to discuss the possibility of some monetary compensation to those to whom the apology was given. As Professor Sarah Maddison has remarked in a book soon to be published: Where apologies are not accompanied by direct and immediate actions, the words may seem superficial, insincere or meaningless.[3]

Nonetheless, for all the faults and defects of the Australian apology, it was clearly an historic move. I believe that it was also a sincere gesture which had widespread popular support. It was witnessed and later re-affirmed through the presence at Parliament House in Canberra of representative members of the Australian Aboriginal and Torres Strait Islander communities. For a moment, the Parliament truly took on the character of a national house of all the peoples of this continental country.

In the sharp and often bitter divisions that commonly mark parliamentary days in Canberra, this moment stood out. It was a day when an important contribution was made to restorative justice. The fact that it was made both by the Prime Minister and by the Leader of the Opposition and in the presence of virtually all of the members of the Parliament, lent to the occasion a special solemnity and healing quality. Amongst the achievements that he claimed before he later resigned from the office of Prime Minister in 2010, Mr. Rudd put the national apology at the head of his list of matters in which he could take pride. In this assessment he was not wrong.

Nevertheless, words of regret and apology must always be measured against other conduct. It is here that the actions of the major Australian political parties, in government and in opposition, in supporting the hurried legislation on the Northern Territory Intervention, stand in sharp contrast to the national apology.

As it happens, the challenge to the constitutional validity of the Northern Territory Intervention was the very last judgment of mine, delivered during my tenure on the High Court of Australia. Eight weeks before the 2007 federal election, Mr. Howard's government raced through the Australian Parliament a very large statute, ostensibly designed to respond to a report to the Northern Territory government *Ampe Akelyernemane Meke Mekarle* or *Little Children Are Sacred*.[4]

Purportedly, the purpose of the new law was to introduce strong measures aimed at stopping child abuse and protecting women and children. Those measures were supported, as Sarah Madison points out, by the then Labor opposition in the Federal Parliament. This support has substantially been continued by the succeeding Labor governments.

The High Court of Australia rejected a challenge to the validity of the Intervention law. Indeed, the majority held that the challenge was even unarguable at law. I disagreed. I did so fundamentally because I read the Australian constitutional promise to provide 'just terms' for the acquisition of 'property' as including something more than monetary compensation. In my view, and that of Aboriginal objectors, 'just terms' arguably extends to a requirement of proper consultation with the Aboriginal individuals and communities affected. All of which had been denied in the helter skelter rush to enact the legislation in time before the election. Some unkind observers even suggested at the time that the law was rushed for electoral purposes: to 'wedge' the Opposition and to tap into deep feelings in the electorate which are hostile to Aboriginal Australians.

In the reasons for my dissent, I remarked:

> If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no "property" has been "acquired". Or that "just terms" had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected. The Aboriginal parties are entitled to their trial and day in court. We should not slam the doors of the courts in their face. This is a case in which a transparent, public trial of the proceedings has its own justification.[5]

These words and the outcome of the court case were almost wholly ignored in Australia. For a long time, despite a change of government, the *Racial Discrimination Act* had remained suspended in respect of all those affected by the Intervention. Signs outside Aboriginal townships referred to prohibited pornography, stigmatising entire communities. They remain firmly in place to this day. The bans and prohibitions of the earlier era of *Protection Acts* remained in force. Intrusions and affronts, as well as unequal treatment of citizens, remain in place. A miserable number of houses have been built, as tokens of the "achievement" of the major intrusions of federal

police and defence personnel. The authors of the report *Little Children Are Sacred*, which was invoked to justify the Intervention, always insisted on the imperative need for prior consultation. I agree with those authors, and with the then President of Amnesty International, Irene Khan, that what happened was 'not merely disheartening; it was morally outrageous'.

Nevertheless, anger and guilt are not a sufficient response to the wrongs done to Indigenous Australians. We can learn from other societies in whose name great wrongs have been done. The lesson of other instances is that resolution only really occurs where there is a national apology; but one that is conjoined with specific identification of what exactly occasions the apology. And an appropriate recompense is needed beyond words which come cheap. Only words accompanied by action will create the means to establish a new and healthy relationship.

To find a path towards true reconciliation and justice remains a very important challenge for the as yet incomplete Australia project. Reflecting on the wrongs challenge us to contemplate and embrace restorative justice. It should be possible for our continent of privilege to take up this challenge. But is there now the will to do so?

Michael Kirby was Justice of the High Court of Australia (1996-2009) and Chairman of the Australian Law Reform Commission (1975-1984).

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

2 M Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press, 1998) 114.

3 Sarah Maddison, *Beyond White Guilt* (Allen & Unwin, 2011, forthcoming).

4 Northern Territory, Board of Enquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* (2007).

5 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 394-5 [214].

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