

Private Law and Grave Historical Injustice: The Role of the Common Law

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Abstract

This article reclaims an important role for the common law in cases of grave historical injustice, which we define as serious, widespread instances of wrongdoing that have remained unaddressed and un-redressed for long periods of time. Contemporary examples in Australia include the abuse of vulnerable individuals within the Catholic Church and Australian Defence Force and the historic theft of wages from Aboriginal peoples.

Contemporary discourse assumes that private law has little to contribute to the debate about how to deal with such cases. It focuses instead on public apologies and limited reparation schemes, on the basis that these offer victims quicker, more satisfactory solutions. We suggest an important role for private law and its corrective justice framework in informing and enhancing the design of reparations schemes current and future, so as to accord victims a fuller and more meaningful measure of justice.

I. INTRODUCTION

Australia is restlessly awake to the phenomenon of grave historical injustice: widespread wrongdoing which, whether for institutional, social, political or other reasons, has remained unaddressed and un-redressed for long periods of time. Pressing, contemporary examples of such injustice include forced child migration,¹ clergy abuse, forced adoptions,² the Stolen Generations³, stolen wages, and institutionalised abuse within the Australian Defence Force (ADF). Many of these cases have international parallels. The issue of how to resolve them pricks the conscience of all civilised nations.

Existing solutions are dominated by the making of public apologies to victims. Sometimes, these are backed by extra-legal, political or administrative measures, including limited reparation schemes. If private law is not exactly ignored, it is firmly set aside, litigation being thought too expensive and obstructed by technical and evidential hurdles to offer a realistic avenue of recourse. In many instances, victims resorting to private law have indeed stumbled at these hurdles⁴ and the conscious purpose of extra-legal mechanisms has been to sidestep them. In doing

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¹ Apology on Child Migrants, Prime Minister the Hon Gordon Brown MP (House of Lords Hansard 24 February 2010, column 1018)

² National Apology for Forced Adoptions, Prime Minister Julia Gillard. <http://www.ag.gov.au/About/ForcedAdoptionsApology/Pages/default.aspx> (30 June 2014); Hansard 21 March 2013 p 2974, The Hon Mark Dreyfus MP (Attorney General), referring to the "...apology given earlier today by the Prime Minister".

³ National Apology to the Stolen Generations, Prime Minister Kevin Rudd (House of Representatives Hansard, 13 February 2008 p 167).

⁴ For some of these hurdles, see eg *Trustees of the RCC v Ellis* (2007) 70 NSWLR 565.

so, such schemes replicate the *language* of private law, claiming to ‘repair’ wrongs done and restore enrichments unjustly obtained whilst making access to justice easier, but their conception of ‘restoration’ is weak by comparison to private law analogues. Payouts are capped, or made *ex-gratia* and solutions are modelled without reference to the more powerful remedies and safeguards which victims might have at law.

Our purpose here is to reclaim for private law a valuable role in informing the design of reparations schemes. Indeed, we argue that the design of such schemes has hitherto tended to throw some of private law’s most valuable insights out with the bathwater. Private law has a unique infrastructural apparatus and normative approach to remedying injustice, which endorses a powerful conception of reparation based in part on ancient norms of corrective justice.⁵ It also expresses clear and important commitments to the values of independence, transparency, consistency, accountability and reviewability in dealing with victims’ claims.

Whilst we applaud apologies as a first step, we therefore suggest that closer attention to private law’s ethical commitments and remedial solutions can assist in improving the way that schemes are currently modelled. In doing so, we posit a significant role for corrective justice and rights discourse as a counterpoint to weaker, distributive justice approaches to dealing with serious and widespread social harms, when the trend of much legal thinking since the late 20th century has been in precisely the opposite direction.⁶ Distributive justice models of redress are undoubtedly beneficial in lowering legal costs and helping to meet the basic needs of accident victims.⁷ However, our key observation is that reparation schemes operating in the cases of historic injustice under examination are designed, funded and run by the very institutions implicated in, or accepting responsibility for the wrongdoing in question. Distributive justice models of reparation are less appropriate, we suggest, as institutional responses to injustices committed or sanctioned by the ‘repairing’ institutions themselves – particularly where the institutions are as powerful as government or the Catholic Church. Such cases require strong norms of accountability and the fullest and most meaningful form of repair. A better understanding of the type of repair required in such cases can be gleaned from the norms and remedies of private law.

The aim of this analysis is not to advocate the pursuit of historic injustice claims as private law claims through the courts, although there are undoubtedly changes that could be made to our legal system to improve its effectiveness and reach.⁸ Rather, we invite a deeper and more meaningful engagement between current reparations measures and the normative and doctrinal lessons that private law offers. Existing extra-legal solutions should draw constructively upon private law’s rich understanding of what *justly* correcting past wrongs means. Where such schemes seek to define the obligations of institutions which *are responsible*, or *accept responsibility for injustice*, they ought more closely to map some features of private law’s solutions.

Below, we interrogate below three examples of grave historical injustice in Australia and the reparations schemes that have been designed to deal with them. These examples are chosen

⁵ The origins lie with Aristotle, *Nicomachean Ethics*, Book 5, Ch 4. For perhaps the most sustained and influential modern account of private law as an instantiation of corrective justice see E Weinrib *The Idea of Private Law* (Cambridge, Harvard, 1995); ‘Restitutionary Damages as Corrective Justice’ (2000) 1 *Theoretical Inquiries in Law* 1; ‘The Normative Structure of Unjust Enrichment,’ in C Rickett, R Grantham (eds) *Structure and Justification in Private Law* (Oxford, Hart, 2008) and *Corrective Justice* (OUP, 2012).

⁶ This at least the case as regards accidental injury: see T Ison *The Forensic Lottery* (Staples, London, 1968); *Accident Compensation: A Commentary on the New Zealand Scheme* (1980); P Atiyah *Accidents, Compensation and the Law* (1970) and H Luntz ‘Reform of the Law of Negligence: Wrong Questions-Wrong Answers’ (2002) 25 *UNSWLJ* 836.

⁷ See eg. Accident Compensation Scheme (NZ).

⁸ For example, creative extensions to the doctrines of vicarious liability, non-delegable duty and limitation, amongst other substantive and procedural adjustments.

because they are paradigmatic and help to highlight the potential of private law's doctrines and remedies. In each case, a public apology has already been made and institutional responsibility for repair accepted. Part II reviews current administrative responses to cases of institutionalised abuse in the ADF and the Australian Catholic Church, setting them alongside private law principles and analogues. Part III does the same in respect of the NSW scheme dealing with the stolen wages of aboriginal Australians. Part IV then draws together some of the lessons that private law offers to reparations scheme design. In this final Part we make specific recommendations about both the design of awards and institutional integrity.

II. INSTITUTIONALISED ABUSE

There are close parallels between the historic, physical and sexual abuses committed within the ADF and Australian Catholic Church. Both organisations are hierarchical, male-dominated and attended by internal norms and codes of conduct, which are invisible to the outsider. Each has its own internal legal system, in the form of military or canon law, which arrogates to itself powers of investigation, accountability and remedy. Although both institutions operate within the broader framework of private law, they hence have a closed, structural form and a discrete set of internal norms that have tended to keep both abuses, and the institutional responses to those abuses, away from external scrutiny. The following sections examine the responses to abuses within the ADF and the Church in turn, before comparing private law principles.

A. Australian Defence Force Abuse: The DART scheme.

The Australian Government established the Defence Abuse Response Taskforce ('DART') as part of its response to the DLA Piper review⁹ into allegations of sexual and other forms of abuse in the Department of Defence and the ADF. DART was established to assess and respond to individual cases of abuse occurring before 11 April 2011, with its remit to do so concluding by 30 November 2014.¹⁰ It was accompanied on 26 November 2012 by a public apology to victims made by both the Chief of the Defence Force (CoD), General Hurley¹¹ and Defence Minister Smith.¹²

DART comprises three limbs: the Defence Abuse Reparations Scheme ('Reparations Scheme'), the Defence Abuse Restorative Engagement Program ('Restorative Engagement') and the Defence Abuse Counselling Program ('Counselling Program'). Particular cases may be referred

⁹ The Piper Review was announced on 11 April 2011. Recommendation 7 of the Piper report advocated the establishment of a 'capped compensation scheme', but the finalised DART scheme uses the language of 'reparation' not 'compensation'. Recommendation 8 suggested a 'framework for private facilitated meetings between victims, perpetrators and witnesses of abuse', interpreted by DART as a mechanism of restorative justice. This is now embodied in the Restorative Engagement program: DART, *First Interim Report to the Attorney General and Minister for Defence* ('1st Report'), March 2013, 25.

¹⁰ DART, *Third Interim Report to the Attorney General and Minister for Defence*, September 2013, 2.

¹¹ <http://video.defence.gov.au/#searchterm.0.david%20hurley.All>

¹² Hansard House of Representatives 26 November 2012, The Hon Stephen Smith MP, p 13105 (Ministerial Statement, Abuse in Defence).

to the CoD for ‘military discipline, administrative sanction or other administrative action.’¹³ They can also be referred to civilian police authorities.¹⁴

The Reparations Scheme covers allegations of ‘abuse’, which is defined to mean sexual abuse, sexual harassment, physical abuse or workplace harassment and bullying.¹⁵ There is a separate ground of claim covering the mismanagement of prior allegations of abuse. To determine whether an allegation or complaint falls within the scope of the scheme, it must be considered whether:

- the alleged abuse occurred whilst the complainant was an employee of Defence (either as a serving member of the ADF, including the Reserves, an employee of Defence, or a cadet);¹⁶
- the alleged abuser was a Defence employee;
- there is a connection between the alleged abuse and the Defence employment
- the alleged abuse occurred prior to 11 April 2011; and
- the alleged abuse or complaint was reported to DART prior to the reporting deadline of 31 May 2013 (in connection with abuse which occurred before 11 April 2011).

Assuming that the matter is one over which the Reparations Scheme has jurisdiction, the Reparations Payments Assessor (an independent person appointed to make administrative decisions regarding payments under the scheme) (‘the Assessor’) must be satisfied that the complainant suffered abuse, or had their allegation of abuse mismanaged by Defence. The evidentiary standard applied in respect of either type of claim is one of ‘plausibility’,¹⁷ which means ‘having the appearance of reasonableness.’¹⁸ This is lower than the standard used in either civil or criminal proceedings.¹⁹ The Assessor is given much latitude in reaching this determination and may rely on a statutory declaration to establish the veracity of a complainant’s statement. Other material available to the Assessor includes (but is not limited to) medical and defence records, third-party statements and similar allegations of abuse, which have been brought to the attention of DART and which ‘occurred in the same Defence institution.’²⁰ Once a finding of abuse meets the plausibility standard, the Assessor may make a reparation payment of up to \$50,000. Payments are tiered so as to recognise increasingly serious abuse:

- Category 1: \$5,000 (eg a single incident of physical assault with no serious injury. This may also fall into category 2);²¹
- Category 2: \$15,000;

¹³ DART, *Fourth Interim Report to the Attorney-General and Minister for Defence*, (‘4th Report’) December 2013, 7. The decision to refer a matter rests with the chair, although the wishes of the complainant will be considered. In general, the task force works only towards those outcomes which the complainant indicates that he or she wants, but account is also taken of any ‘...actual or potential risk to defence personnel from an alleged abuser who is still serving’. The fact that a crime may have been committed is also relevant.

¹⁴ *4th Report*, 14. Where the complainant chooses to engage in Restorative Engagement, this may impact upon whether or not a criminal investigation can proceed simultaneously. The complainant may delay participation in Restorative Engagement until she has received police advice that it is appropriate to do so. See *4th Report*, Appendix G, 58-59.

¹⁵ DART, *Second Interim Report to the Attorney-General and Minister for Defence*, June 2013, (‘2nd Report’) 6.

¹⁶ *2nd Report*, 6. It is unclear whether the scheme applies to a civilian (ie a person never employed by Defence) who has been abused by a defence force member. However, eligibility criteria suggest that *both* the victim and the alleged abuser must have been defence employees: DART, *Fifth Interim Report to the Attorney-General and Minister for Defence* (‘5th Report’), March 2014, Appendix F, 53.

¹⁷ *2nd Report*, Appendix C.

¹⁸ *2nd Report*, 5.

¹⁹ *2nd Report*, Appendix C.

²⁰ *2nd Report*, Appendix C.

²¹ *2nd Report*, Appendix N.

- Category 3: \$30,000;
- Category 4: \$45,000 (eg serious sexual assault);²² and
- Mismanagement Payment: \$5,000.

In determining entitlement and level of payment, the Assessor takes into account ‘all plausible, in-scope abuse experienced by a person prior to 11 April 2011.’²³ Relevant factors include:²⁴

- the number of instances of abuse;
- its nature and seriousness;
- the time period over which it occurred;
- the number of alleged abusers;
- the seniority or rank of the alleged abuser(s);
- whether the abuse was witnessed or encouraged by others;
- the victim’s circumstances when the abuse occurred; and
- whether a person in a position of authority in Defence had any involvement in the abuse.

These guidelines are expressed not to be required to be applied ‘in an absolute manner’ given the ‘almost infinite’ circumstances of individual cases.²⁵ Category 4 is intended to meet the most serious forms of individual or collective abuse.

In relation to Mismanagement Payments, the Assessor has discretion to award an additional \$5,000 in *all* cases in which she is plausibly satisfied that Defence failed:²⁶

- properly to manage a report of abuse made to it by the complainant, or by some other person in respect of abuse of the complainant;
- to take reasonable management action to stop abuse occurring when Defence knew or ought to have known of it, and in which the complainant did not report the abuse because of that failure;
- to take management action to stop abuse when it was being perpetrated by a person in Defence in a position of seniority or higher rank to whom the abused would otherwise have reported it *and/or* when it was witnessed by a such a person who took no steps to stop it;
- to take reasonable management action in response to abuse where the complainant presented to a superior or other person in authority within Defence, with such physical or psychological signs of injury as ought reasonably to have given rise to concern that the complainant was being, or may have been, abused, but that person failed to make any inquiry about it.

By 3 March 2014, 326 reparations payments had been made, including 230 payments at the maximum amount of \$50,000, representing Category 4 abuse plus a Mismanagement Payment.²⁷ The Taskforce’s *Second Interim Report* provides a useful hypothetical case designed to illustrate this, most severe, type of case.²⁸

²² 2nd Report, Appendix N.

²³ 4th Report, 9.

²⁴ 4th Report, 9.

²⁵ 2nd Report, Appendix N.

²⁶ 4th Report, 9.

²⁷ 5th Report, 17.

²⁸ 2nd Report, 14-15.

Alongside the Reparations Scheme are the possibilities of Restorative Engagement and referral to the Counselling Program. Restorative Engagement entails complainants meeting privately with senior Defence representatives. It supplements the blanket public apologies that victims received in November 2012 and offers a one-on-one encounter with the institution. It is not a meeting with the abuser, but rather a forum in which personal accounts of abuse may be heard, acknowledged, validated and responded to. It may have particular resonance where a complaint of abuse has been mismanaged.

Following a finding of plausibility by the Assessor and the complainant's consent that the matter be referred for Restorative Engagement, a Facilitator is appointed. A senior Defence representative²⁹ and the complainant (with a support person present if desired) will have a series of face-to-face, or indirect (such as via email or letter),³⁰ restorative engagement conferences. It is expected that Restorative Engagement will continue beyond 30 November 2014.³¹

The Counselling Program supports complainants throughout the process and funding for this program appears to be on-going.³²

B. Clergy Abuse: Inquiries and Church Reparations

The horrors of the clerical abuse of children and vulnerable others were recognised on 11 April 2014 by a form of oral Papal apology in which Pope Francis 'personally took on' the evils perpetrated, requested 'forgiveness for the damage done' and promised 'not to take one step backward with regards to how we will deal with this problem, and the sanctions that must be imposed.'³³ On 7 July 2014 he delivered a homily asking for 'the grace to weep ... and make reparation' and acknowledging the suffering of victims and their families. He 'express[ed] [his] sorrow ... and humbly ask[ed] forgiveness.'³⁴ Previously, Pope Benedict in a homily for World Youth Day in Sydney on 19 July 2008 expressed his own 'deep sorrow' for the 'pain and suffering... victims have endured', referring to clerical abuse as 'misdeeds' and 'evils' saying that '[v]ictims should receive compassion and care, and those responsible for these evils must be brought to justice.'³⁵ These apologies, albeit indirect, come late in the story of responses to clergy abuse and are perhaps not the final Papal statements on this matter. No formal, comprehensive apology is to be found on the Holy See website at the date of writing.³⁶

²⁹ The CoD, the Secretary of Defence, the Vice Chief of the Defence AUS, the Chief of Navy, the Chief of Army, and the Chief of the Air Force have all agreed to meet personally with complainants. It is also contemplated that other senior defence leaders will be involved. *4th Report*, Appendix F, 52-53.

³⁰ *4th Report*, Appendix F, 52.

³¹ *5th Report*, 11.

³² *5th Report*, 39.

³³ http://w2.vatican.va/content/francesco/en/speeches/2014/april/documents/papa-francesco_20140411_ufficio-cattolico-infanzia.html (4 June 2014). Pope Francis, address to members of the International Catholic Child Bureau, 11 April 2014.

³⁴ Homily of Pope Francis, Monday 7 July 2014, Holy Mass in the Chapel of the *Domus Sanctae Marthae* With a Group of Clergy Sex Abuse Victims (http://w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco_20140707_omelia-vittime-abusi.html) (4 September 2014).

³⁵ Homily of Pope Benedict XVI, Eucharistic Celebration with Bishops Seminarians and Novices, Saint Mary's Cathedral, Sydney, 19 July 2008 (http://w2.vatican.va/content/benedict-xvi/en/homilies/2008/documents/hf_ben-xvi_hom_20080719_cathedral.html) (18 March 2015).

³⁶ http://www.va/phome_en.htm (4 June 2014 and 4 September 2014). See http://w2.vatican.va/content/francesco/en/speeches/2014/april/documents/papa-francesco_20140411_ufficio-cattolico-infanzia.html (4 June 2014). (http://w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco_20140707_omelia-vittime-abusi.html) (4 September 2014). There have been other specific documents of apology. For example in relation to the Republic of Ireland, Pastoral Letter of the Holy Father Pope Benedict XVI to the Catholics of Ireland, 19 March 2010 (http://w2.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html) (20 March 2015).

Clergy abuse in Australia is well documented. The *Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse*'s (Royal Commission)³⁷ remit extends beyond the abuse of children by clerics and does not consider cases of adult abuse, but is clearly of great, contemporary relevance. There have also been two State-level inquiries: *Betrayal of Trust Inquiry into the Handling of Child Abuse by Religious and Other Non-Governmental Organisations*³⁸ and *Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle*.³⁹

Although one of the Royal Commission's objectives is to look at 'support and redress' for victims of child sexual abuse,⁴⁰ no such measures systematically exist. In 1996, the Australian Catholic Bishops Conference adopted *Towards Healing: Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia*.⁴¹ This protocol is used in all Australian Catholic archdioceses, dioceses and religious orders except for the Melbourne Archdiocese, which in 1996 adopted its own approach in *Sexual and Other Abuse: The Melbourne Response*.⁴² Both are private systems of reparation for those who have been abused (sexually or otherwise) by priests or others under the control of the Archbishop of Melbourne, or church authorities in the rest of the country. Both processes share the same guiding principles: '[t]he Melbourne Response reflects the principles that are set out in the *Towards Healing* and *Integrity in Ministry* documents which all of the Bishops and leaders of Religious Institutes of the Catholic Church in Australia have adopted'⁴³. These principles are expressed to include a commitment to knowing the truth, humility, healing for victims and assistance to those affected, a just and effective response and prevention of further abuse.⁴⁴ Payments under the *Melbourne Response* are expressly made *ex gratia* and capped at \$75,000. Counselling and apology may also be offered. *Towards Healing* commands a response 'to the needs of the victim in such ways as are demanded by justice and compassion.' Responses include apologies, the provision of counselling services or payment of counselling costs. 'Financial assistance or reparation may also be paid to victims of a criminal offence or civil wrong, even though the Church is not legally liable.'⁴⁵ All payments are thus entirely *ex gratia*.

The Royal Commission has invited submissions on the operation of both schemes. Those made by Slater and Gordon⁴⁶ and John and Nicola Ellis (Solicitors)⁴⁷ are important accounts of the way the schemes operate 'on the ground'. Whilst payments under *Towards Healing* are not subject to any *formal* monetary cap, the Ellis submission describes them as 'modest' (often between

³⁷ Letters patent, 11 January 2013.

³⁸ Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust Inquiry into the Handling of Child Abuse by Religious and Other Non-Governmental Organisations* (November 2013).

³⁹ *Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle*, Margaret Cuneen SC, 30 May 2014 (NSW).

⁴⁰ <http://www.childabuseroyalcommission.gov.au/research/research-program> (2 June 2014). At the time of writing the Royal Commission into Institutional Responses to Child Sexual Abuse *Consultation Paper Redress and Civil Litigation* January 2015 had just been issued.

⁴¹ Australian Catholic Bishops Conference and Catholic Religious Australia, January 2010 ('*Towards Healing*'). *Towards Healing* was first published in 1996 and revised in December 2000 and January 2010.

⁴² Catholic Archdiocese of Melbourne, September 2012 <http://www.cam.org.au/Portals/0/Documents/Melbourne-Response-2012-brochure.pdf> ('Melbourne Response').

⁴³ *Melbourne Response* statement of Denis Hart.

⁴⁴ *Towards Healing*, 12.

⁴⁵ *Towards Healing*, 41.1.

⁴⁶ Submission of Slater & Gordon Lawyers to the Royal Commission into Institutional Responses to Child Sexual Abuse in response to Issues Paper No 2 concerning *Towards Healing* (9 July 2013) (S&G).

⁴⁷ J and N Ellis Submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No 2-Towards Healing [Roman Catholic Church Entities], 4 October 2013 (Ellis).

\$20,000 to \$40,000)⁴⁸ and suggests that, in practice, they too are subject to a notional cap.⁴⁹ The church is reported to have upheld some 618 complaints under *Towards Healing* and the *Melbourne Response* (combined) in respect of claims in Victoria.⁵⁰ It is difficult to determine the exact amounts paid in many cases, because ‘[t]here have been releases signed under protocols between the parties that have denied liability and sought confidentiality.’⁵¹ There is no formal right to appeal or review a decision under either process, despite an obligation at least under *Towards Healing* to provide complainants with reasons for the assessor’s decision. Moreover, even this obligation to give reasons does not apply to reparations decisions, only findings as to the investigation of the facts of the case to the extent that there is ‘significant dispute or uncertainty as to the facts, or ... a need for further information concerning the complainant.’⁵² There is also doubt about the guiding principle informing the assessment of awards. The *Melbourne Response* speaks specifically of ‘compensation’ whereas under *Towards Healing* it is ‘[f]inancial assistance or reparation’ which may be paid.⁵³ The lack of transparency of process and the lack of review mean that ‘[t]here is no real way of determining how a complainant’s award of compensation is assessed.’⁵⁴

The *Melbourne Response* comprises an Independent Commissioner, a Compensation Panel and Carelink, which provides free counselling and professional support. Carelink refers clients, coordinates and pays for their care by psychologists, psychiatrists and other health care providers. The Commissioner ‘makes a determination on the basis of the evidence’ and must be ‘satisfied that the abuse occurred,’ the standard of proof being the balance of probabilities.⁵⁵ The Office of the Independent Commissioner is funded by (but said to operate independently of) the Archdiocese of Melbourne and is required to act according to the principles of ‘natural justice and Canon Law’.⁵⁶ If the Commissioner becomes aware of abuse that may constitute criminal misconduct, he or she *may* report it to the police.⁵⁷ The Compensation Panel determines whether or not to make an *ex gratia* payment of compensation, in which case a Deed of Release is signed by the parties.⁵⁸

Towards Healing is a more bureaucratic, multi-party process. Ultimately, the Director of Professional Standards appoints Assessors to conduct an ‘assessment’, the purpose of which is ‘to investigate the facts of the case to the extent that it is possible ... where there is a significant dispute or uncertainty as to the facts ... or ... need for further information concerning the complainant.’⁵⁹ The assessors draft a report, which, together with other information such as any

⁴⁸ S&G [69]-[70].

⁴⁹ Ellis [16].

⁵⁰ Supplementary Submissions of the Catholic Church in Victoria to the Victorian Parliamentary Inquiry into the handling of Child Abuse by Religious and Other Non-Governmental Organisations placed on the public record on 6 June 2013, ‘Collated Statistics for Criminal Child Abuse in the Catholic Church in Victoria (to 30 June 2012): http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria_Supplementary_submission_2.pdf.

⁵¹ S&G [65].

⁵² *Towards Healing* [40.4.1] ‘The assessors must provide reasons for their findings...’ and [40.9.3] ‘The complainant is entitled to know promptly the findings of the assessment and the reasons for them.’ S&G [78] record a suggestion that there is a limited right under O56 of the *Supreme Court Rules* (Vic).

⁵³ *Towards Healing*, [41.1].

⁵⁴ S&G [74].

⁵⁵ P Murnane *Reply Submission to the Victorian Parliamentary Inquiry*, 23 February 2013, p 2.

⁵⁶ *Melbourne Response*, text under heading ‘Independent Commissioner’.

⁵⁷ *Melbourne Response* - Appointment of Independent Commissioner To Enquire into Sexual and Other Abuse, definition of ‘sexual and other abuse’ (iv)

⁵⁸ Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust Inquiry into the Handling of Child Abuse by Religious and Other Non-Governmental Organisations* (November 2013) 20.1.1.

⁵⁹ *Towards Healing* [40.2].

psychiatric assessment the victim is required to undergo, is provided to the Director of Professional Standards and the Church Authority. At a subsequent ‘facilitation meeting’ attended by the victim and representatives of the Church Authority (together with their lawyers, although the victim may not be legally represented) a reparation amount is negotiated and an apology may be made.⁶⁰

Assessors are directed to make findings on the balance of probabilities,⁶¹ ensuring that a record is made of all interviews.⁶² There is an obligation to provide reasons to the complainant,⁶³ but only regarding the assessment process (the finding that a complaint is true), not the reparations phase. Both models contain a qualified commitment to reporting criminal offences to the police, protecting where requested the identity of the complainant.⁶⁴ However it should be noted that in neither model is reporting *mandatory*. As identified above, under the Melbourne Response, the Independent Commissioner *may* report conduct to the police and Towards Healing states that the Director of Professional Standards *should* (not *shall*) provide information to the Police.⁶⁵ Whilst *Towards Healing* mandates that ‘Church personnel who are required by law to report suspected child abuse shall conscientiously comply with their obligations’⁶⁶ reporting to the police is not mandatory in all states and territories, and these external requirements may in any case only incidentally apply to church personnel through their work as teachers or health workers.⁶⁷

⁶⁰ *Towards Healing* [41.4].

⁶¹ *Towards Healing* [40.9].

⁶² *Towards Healing* [40.8].

⁶³ *Towards Healing* [40.9.1] and [40.9.3].

⁶⁴ *Towards Healing* [37.4], [37.5]. Historically, the documented pattern was instead to cover up allegations of abuse, moving clerics from diocese to diocese thereby making it difficult to detect and apprehend offenders. See eg *Betrayal of Trust*, above n 39, volume 1: [7.3.6]-[7.3.8]. K Tapsall in *Potiphar’s Wife* (ATF Press Ltd, Adelaide, 2014) ch 7 suggests that, at least in so far as a failure to report abuse to police and other authorities was concerned, secrecy was, and *still is*, itself a requirement of Canon law. Tapsall refers to *Crimen Sollicitationis* (‘On the Manner of Proceeding in Causes of Solicitation’), a Decree issued by Pope Pius XI in 1922 effectively imposing pontifical (and thus absolute) secrecy on all information obtained through the Catholic Church’s Canonical investigations of clergy abuse. This decree has subsequently been affirmed and extended, most recently in 2010 by Pope Benedict XVI. See http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (4 June 2014). See also *Betrayal of Trust Inquiry*, above n39, volume 1, [1.3].

⁶⁵ *Towards Healing* [37.4]. The Catholic Archdiocese of Sydney in a document entitled *Sexual Abuse The Response of the Archdiocese of Sydney*: http://www.sydneycatholic.org/im/home/ARC_Sexual_Abuse-%20Response_Website_3.pdf (accessed 23 June 2015) which in section 5 states: “The police are best placed to investigate allegations of sexual abuse and sexual assault, not the church. Sexual abuse has no place in the church and the best way to investigate it is to report criminal conduct to the police. The law requires serious crimes to be reported to the police and the policy of the Archdiocese is to report allegations of sexual abuse to the police.” Following the evidence given in the Royal Commission hearings in Ballarat and elsewhere, Anthony Fisher, Archbishop of Sydney in a letter to the faithful dated 22 May 2015 “...encourage[ed] all victims of abuse to contact the police.” <http://www.sydneycatholic.org/people/archbishop/addresses/pdf/img-522172943-0001.pdf> (accessed 23 June 2015).

⁶⁶ *Towards Healing* [37.5].

⁶⁷ The mandatory reporting provisions are summarised in B Matthews, *Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse (August 2014), Table 1. See, eg, in QLD: *Health Act 1937*, as amended by *Health Act Amendment Act* (No 26) s 4 (imposing a reporting requirement on ‘medical practitioners’); *Education (General Provisions) Act 2004* (commenced 19 April 2004) (for the first time requiring school staff, including teachers, to report suspected sexual abuse, but only if committed by school staff employees); *Public Health Act 2005* (commenced 31 August 2005) (adding nurses to doctors as mandated reporters of all suspected cases of child sexual abuse, and clarifying doctors’ duty to report sexual abuse); *Education (General Provisions) Act 2012* (commenced 9 July 2012) (requiring school staff including teachers to report all suspected cases of child sexual abuse *regardless* of perpetrator identity and also requiring them to report suspected likely cases). Matthews outlines in Table 10 to whom the report is made. The obligations on doctors and nurses in QLD under *Public Health Act 2005 (QLD)* is to the Director-General or CEO of the Department; a report made by school staff under *Education (General Provisions) Act 2012 (QLD)* is to the school principal and then the principal to the police. Note that these mandatory reporting provisions vary from state to state. In addition, a person may in any case be under a legislative duty to report a known criminal offence (eg *Crimes Act 1900*

The Royal Commission in *Consultation Paper Redress and Civil Litigation* ('Consultation Paper')⁶⁸ proposes that an independent body replace *Towards Healing* and the *Melbourne Response*. This independent body is to make redress via a scheme of monetary payments as a tangible means of recognising the wrong suffered by victims of abuse.⁶⁹ These payments would be paid *ex gratia*⁷⁰ and according to a matrix recognising the severity of abuse, the impact of that abuse and distinctive institutional factors.⁷¹ They would be subject to a cap, the precise level of which is yet to be determined and victims wishing to claim sums in excess of the cap would be required to take their chances in civil litigation, the features of which should be improved for future victims.⁷² The standard of proof may be a 'plausibility' test or a test of 'reasonable likelihood,' rather than the balance of probabilities standard of civil litigation. The Consultation Paper acknowledges that 'the higher the amount of monetary payments available, the more reasonable it might be for a scheme to adopt a higher standard of proof'.⁷³ It is not proposed that the remit of the decision making body is to make any findings that a named person is involved in abuse and for that reason the Consultation Paper states that 'there is no need to adopt the standards of proof applied in civil litigation.'⁷⁴ Mechanisms of apology⁷⁵ and the provision of counselling and psychological care⁷⁶ are also proposed. For ease of reference, these measures are collectively referred to in this article as the Royal Commission Redress model.

C. Abuse Reparation: Private Law Principles and Analogues

Private law tends to deal with cases of abuse primarily through the law of torts, in particular the torts of assault, battery and negligence. Some attempts have been made to sue abusers and institutions for the equitable wrong of breach of fiduciary duty, but these have failed in Australia on the basis that fiduciary duties protect a person's economic and property interests, not their physical or mental welfare.⁷⁷ The common law of torts has no exact vehicle for cases of bullying and harassment resulting in mere distress,⁷⁸ but it does provide actions for the intentional or negligent inducement of psychiatric harm⁷⁹ and some jurisdictions provide statutory harassment actions giving rise to damages awards.⁸⁰

The main obstacles for tort actions consist in evidential problems (such as the death of witnesses or abusers) and limitation provisions, although there are recent signs in the Australian case law

(NSW) s316 'Concealing serious indictable offence') or may have committed the common law offence of misprision of a felony.

⁶⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper Redress and Civil Litigation* (January 2015).

⁶⁹ Consultation Paper 6.1.

⁷⁰ Consultation Paper 6.1.

⁷¹ Consultation Paper 6.4.

⁷² Consultation Paper 6.4 and Chapter 10.

⁷³ Consultation Paper p170.

⁷⁴ Consultation Paper p171.

⁷⁵ Called a 'Direct Personal Response'. See Consultation Paper, section 4.

⁷⁶ 'Counselling and Psychological Care', Consultation Paper, section 5.

⁷⁷ *Tusyn v State of Tasmania* (2004) 13 Tas R 51; *AT v Mervyn Donald Lyons and Betty Ruth Lyons as Administrators of the Estate of the Late Paul John Lyons and Ors* [2005] ACTSC 135; *Michael Brown v State of New South Wales* [2008] NSWCA 287; *Pope v Madsen* [2015] QCA 36, all applying *Paramasivam v Flynn* (1998) 160 ALR 203. Contrast the position in Canada, where actions have met with some success.

⁷⁸ The possibility of a tort of intentionally inducing mental distress was considered but rejected in *Wong v Parkside Health Trust* [2001] EWCA Civ 1721 and *Giller v Procopets* (2008) 245 VR 1.

⁷⁹ *Wilkinson v Downton* [1897] 2 QB 57; *Oyston v St Patrick's College* [2013] NSWCA 135.

⁸⁰ Eg, *Protection from Harassment Act 1997* (UK), s 3. Liabilities under the Act attach to institutions held to be vicariously liable: *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34.

that judges are prepared to apply these provisions liberally in the light of the repressive effects that abuse can have upon a victim's ability to manage his or her affairs. In all cases, the clock only starts to run when the abused attains the age of majority, which helps in more recent cases of child abuse. Sometimes the start of the clock is further postponed where a victim has justifiably failed to connect complex psychiatric problems with their earlier abuse. Indeed, in *Rundle*, this resulted in an action being allowed to proceed some 38 years after the abuse took place.⁸¹ Although limitation rules hence obstruct the claims of victims of majority age who have for (usually⁸²) three years or more known that their mental injuries are connected to an abuse and who are capable of engaging in litigation, it is not *always* the barrier that it is sometimes assumed to be. In Victoria, legislation is now proposed, the effect of which would be to remove limitation bars on all actions by victims for criminal child abuse, both past and future.⁸³

The comparisons which private law provides to existing reparations schemes dealing with institutional abuse can usefully be divided into its general approach to allocating responsibility; the strength of the causes of action it accords to victims and its remedial regime.

1. Frameworks of Legal Responsibility

Where abuses are perpetrated within an institutional setting, private law has two frameworks of responsibility that can be brought to bear. The *first* attaches liability directly to the abuser via the torts of assault and battery. This has the benefit of making the wrongdoer directly personally accountable to the wronged (assuming that both are still alive and in the jurisdiction), but the downside is that it yields nugatory compensation where the abuser is impecunious, as is often the case with an offending priest. Priestly poverty ironically insulates abusers against the legal responsibilities they would otherwise bear in private law to make good the consequences of their behaviour. Individual abusers within the ADF are similarly unlikely to provide a reliable source of compensation, particularly where the damage they have caused is severe and on-going.

The *second* framework attaches liability to the institution itself. Litigators often prefer it precisely because it avoids the risk of a hollow remedy. There are, in turn, two ways of sheeting liability home to the institution: either by holding it liable for its *own* ('direct') failings or by making it 'vicariously' liable for acts of the abuser. Either technique creates an incentive for the institution to take greater precaution. We consider these two potential sources of institutional liability in turn.

Personal failings of the institution itself may consist in negligence in appointing an abuser to a position of responsibility, failing properly to supervise him, or improperly placing a child or other vulnerable person in his care. Negligence claims against government care agencies for abuses suffered by children in state homes or during foster-placements regularly assume this pattern and have met with some success.⁸⁴ Negligence liability for 'failing to protect' victims can arise from the combination of specific powers, or authority, on the part of an institution giving control over

⁸¹ *Rundle v Salvation Army (South Australia Property Trust) and Anor* [2007] NSWSC 44. For other, favourable results on limitation, see, similarly: *State of Queensland v RAF* [2012] QCA 332 (33 years between abuse and filing of action); *DC v New South Wales* [2012] NSWSC 142 (29 years); *TB v New South Wales* [2012] NSWSC 143 (29 years); *GGG v YYY* [2011] VSC 429 (33 years); *Tusyn v State of Tasmania (No 3)* [2010] TASSC 55 (50 years); *Glennie v Glennie* [2009] NSWSC 154 (17 years); *Stingel v Clark* [2006] HCA 37 (31 years) and (in the UK) *A v Hoare* [2008] UKHL 6 (between 12 and 27 years - several claims). Contrast *Hopkins v QLD* [2004] QDC 21 (16 years); *Jx v Gx and Others* [2006] NSWCA 167 (27 years); *SW v New South Wales* [2010] NSWSC 966 (22 years).

⁸² In WA, the limitation period in cases of trespass to the person is 4 years, not 3.

⁸³ *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014* (Vic), inserting a new s27P into the *Limitation of Actions Act 1958* (Vic).

⁸⁴ *SB v New South Wales* [2004] VSC 514.

the risk (in this case the abuser), together with special reliance and/or vulnerability on the part of the victim.⁸⁵ Abuse in the ADF cases fits this paradigm closely because Defence has direct authority over both the abuser and abused. Failure of a government caseworker or other agency to report suspected abuse to the police can also result in liability, whether or not there is a statutory mandatory reporting requirement.⁸⁶ A possible stumbling block for direct claims lies in gathering sufficient evidence that the institution itself had actual or constructive knowledge of the risk of abuse, saving which there is unlikely to be either any positive duty to take care, or a culpable breach. This can be tricky, given the secretive nature of sexual abuse in particular, but it is not an insuperable hurdle when an institution has closed its eyes to the obvious, or swept incidents under the carpet.

Importantly, an institution's personal tort liability for injuries suffered can sometimes be *strict* in the sense of being *completely independent of any finding that the institution's own conduct is at fault*. A well-known example is the responsibility of an employer to ensure safe systems of work for its employees in the workplace. In such cases, the institution owes a personal duty to ensure that reasonable care to protect the injured person *is taken*.⁸⁷ The duty is an 'end-state' or 'result-oriented' duty in the sense that it requires care to be taken of anyone falling within the duty's range and it is 'non-delegable' in the sense that the institution cannot avoid responsibility by engaging agents (whether employees or others) to discharge it. Beuermann has convincingly argued that such direct, strict liabilities are justified in institutional abuse cases on the basis that the institution creates a risk for victims by placing them directly under the abuser's authority and control.⁸⁸ In practice, both Australian and Canadian courts have hitherto been reluctant to extend non-delegable duties of care to such instances,⁸⁹ preferring to impose the primary liability for abuse on the abusive employee and then reach employer institutions indirectly (if at all), via the device of vicarious liability, discussed immediately below. This can achieve the same end result in some cases, without introducing the idea of any 'general' duty being owed by the institution itself to ensure that victims are reasonably protected, but it runs into problems in cases in which the abuser is not technically an employee of the institution. Beuermann's strict, personal duty analysis carries advantages over vicarious liability doctrine in this regard and discloses an important rationale for attaching strict liability to the institution whenever it has given an abuser authority over a vulnerable victim, as is likely to be the case in many institutional settings involving children, but also in cases in which abuser and victim occupy disparate positions of power in a military hierarchy.

Independently of any personal liability the institution attracts for its own failings, it might also be fixed with strict, *vicarious* liability for an abuser's tort. In such instances, whether or not the institution has failed to discharge a duty of its own is beside the point, because it is accountable for *another's* wrong. In clergy abuse cases, this device has foundered in Australian Courts both because the 'Church' is not recognised as a corporate entity to which vicarious liability can attach, and because the relationship between priests and the church as an unincorporated association is deemed technically incapable of amounting to 'employment'.⁹⁰ These hurdles are

⁸⁵ Eg, *Swan v State of South Australia* (1993) 62 SASR 532; *Metropolitan Police Commissioner v Reeves* [2000] 1 AC 36; *New South Wales v Budjoso* (2005) 222 ALR 663. The general approach in respect of the exercise of statutory powers is set out in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

⁸⁶ *TC v New South Wales* [2001] NSWCA 380 (obiter- failed on causation); *DC v New South Wales* [2010] NSWCA 15 (leave to proceed to trial granted).

⁸⁷ *Leighton Contractors Pty Ltd v Fox and Others* (2009) 240 CLR [21] *per* French CJ, Gummow, Hayne, Heydon and Bell JJ.

⁸⁸ C Beuermann 'Vicarious Liability and Conferred Authority Strict Liability' (2013) *TLJ* 265.

⁸⁹ *New South Wales v Lepore & Anor* [2003] HCA 4; *B (KL) v British Columbia* (2003) 230 DLR (4th) 513.

⁹⁰ *Archbishop of Perth v AA* (1995) 18 ACSR 333; *Trustees of RCC (Sydney) v Ellis* [2007] NSWCA 117.

ignored or sidestepped in more imaginative common law jurisdictions.⁹¹ Although church assets are often held by separate legal trust entities, trustees can in principle be held liable in negligence law and a determined court could surely also pierce the trust to make the trust liable.⁹² Ironically, Cardinal Pell's written statement at the *Royal Commission* hearings professes a willingness for the Church to be treated 'like any other organisation and pay damages',⁹³ but this apparent public readiness to step away from the technicalities of the Catholic Church's legal status contrasts obviously and embarrassingly with its past record in defending litigation.

In the ADF case, the vicarious liability solution is more obviously promising because there is both a clear legal entity to sue and an employment relationship between Defence and the abuser, but it is still unclear whether the abuser would be regarded as acting 'within the course of his or her employment' when engaging in abuse, which is another requirement of the doctrine. The position in Australian law is uncertain because, applying traditional tests,⁹⁴ such conduct does not either actually or ostensibly advance the interests of the employer institution, even if it is a risk that its enterprise might create. It may nevertheless be possible to justify vicarious liability where an employer gives the abuser a job that generates a high degree of power and intimacy between him and the victim, going beyond the mere factual opportunity to engage in the abuse.⁹⁵ Many priest-victim and some defence-force relationships involving authority could fit this pattern. In other countries, the traditional legal tests have been replaced by more liberal ones, so as to extend the range of vicarious institutional liability for sexual abuse.⁹⁶ One of these looks for a 'close connection' between the abuser's employment and the abuse and for risks and vulnerabilities that the job creates for the abused. It would not take much for Australian Courts to follow this lead. It is not clear whether vicarious liability advanced in this way would produce a more favourable pattern of institutional responsibility for victims than DART, but it seems likely that it might, because for claims to be admissible under DART, both abuser and victim apparently have to be in Defence employment, whereas vicarious liability could in theory offer recourse to even civilian victims of an abuser on some facts.⁹⁷

The two accountability frameworks provided by private law operate in tandem. Claims can hence be directed against both the abuser and the institution simultaneously and their collective

⁹¹ *John Doe v Bennett* (2004) 236 DLR (4th) 577; *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1.

⁹² *Various Claimants v Catholic Welfare Society* [2013] 2 AC 1, 15 (Lord Phillips).

⁹³ Cardinal G Pell, written statement to Royal Commission, 10 March 2014 at [30]: '*the Catholic Church should be treated like any other organisation and pay damages comparable to those paid by government and other non-government institutions.*' (emphasis added). See also at [155]: 'the Church in Australia should be able to be sued in cases of this kind.' These sentiments have been repeated by Cardinal Pell's successor, Anthony Fisher, Archbishop of Sydney. In his letter issued after the evidence given to the Royal Commission in Ballarat dated 22 May 2015 he stated: "In the Archdiocese of Sydney ... Where [victims] wish to seek legal redress, we assist them in identifying the correct person or body to sue and ensure that sufficient funds are available for compensation or settlement." In the same vein were his statements to ABC Radio National Breakfast interviewer James Carleton on 22 May 2015: "It's already the agreed position of every Bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters; that we will not leave people without an appropriate entity to sue." See <http://www.abc.net.au/radionational/programs/breakfast/archbishop-of-sydney-anthony-fisher/6488980> and http://mpegmedia.abc.net.au/rm/podcast/2015/05/bst_20150522_0736.mp3.

⁹⁴ As to the range of which in Australia, see *Blake v JR Perry Nominees* [2012] VSCA 122.

⁹⁵ *New South Wales v Lepore & Anor* [2003] HCA 4. Of the majority, Gleeson CJ, Gaudron and Kirby JJ appear to take this view. McHugh J preferred an approach based on non-delegable duty. Gaudron J's solution (founded on estoppel) might also yield liability on some exceptional facts. For a more sophisticated analysis of the basis of employers' strict liabilities for the acts of agents and employees, based on the risks created by authority, see C Beuermann "Dissociating the Two Forms of so-called 'Vicarious Liability'" in G Pitel J Neyers & E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013) 463; 'Vicarious Liability and Conferred Authority Strict Liability' (2013) 20 *TLJ* 265.

⁹⁶ *Bazley v Curry* (1999) 174 DLR (4th) 45 (SCC); *Lister v Heselley Hall Ltd* [2002] 1 AC 215(HL).

⁹⁷ See n 17.

responsibility is joint and several.⁹⁸ This means that if the abuser cannot pay, the institution remains 100% liable for the injury suffered, whilst retaining the right to seek indemnity from the abuser if it wishes. The private law doctrine of joint and several liability therefore makes all those responsible for the same abuse *fully* responsible to pay for it, even if their own role (in terms of fault or causal contribution) is small in comparison to that of other responsible parties and even if those other parties cannot pay. The legal assumption that a responsible institution is 100% liable to compensate, even if was not personally involved in abuse, appears to contrast with the implicit structure of thinking embodied in the DART and Church schemes, according to which the ‘real’ responsibility is thought to lie with the abuser and institutions are thought only secondarily or peripherally responsible. Although payment levels under these schemes may in part to reflect the lower evidential hurdles victims have to overcome, it seems possible to us that their meagre level (compared to legal awards) may also reflect a different understanding of the nature and extent of institutional responsibility itself. The same critique is possible of the Royal Commission Redress Model. To the extent that the various reparation schemes reflect this view and suggest that institutions themselves are not fully responsible and liable only to pay small amounts, they contradict the way that the risk of abuse and of impecunious abusers is usually allocated in private law.

2. *Causes of Action*

Whilst liability may attach to institutions for negligence, the paradigm cause of action in abuse cases is trespass to the person. Several features of this action are important in demonstrating the very high priority accorded by law to a person’s interests in their bodily security. Liability is strict, it being necessary to prove only that the *act* of touching was intended by an abuser, not that he or she intended to do wrong, or contravene the plaintiff’s consent. Trespass is also actionable *per se*, without proof of consequential damage. The action hence preserves not just a person’s physical welfare, but fundamental moral and legal powers of *choice* that she has over her body. The importance of preserving *individual choice* is reflected in the remedies available for trespassory violations, detailed below. We argue that the strength of the law’s protection of physical integrity through the tort of trespass provides an instructive lesson for private reparations schemes dealing with physical and sexual abuse. Indeed, we suggest that it is senseless to design such a scheme without taking account of both the way, and the extent to which, such interests have historically been protected in law. To do so is not simply to ignore the law as a technically unwieldy solution, but the important moral and social judgements that are implicit in it.

3. *Tort Remedies:*

Common law tort remedies reflect deep normative commitments to: restoring victims fully to their *status quo ante*; preserving victim rights and powers of choice; deterring wrongdoing, and expressing strong disapproval of egregious conduct. Such remedies provide informative contrasts to those available under *DART*, *The Melbourne Response*, *Towards Healing* and the *Royal Commission Redress* model, highlighting what are in our view significant inadequacies. The discussion below focuses on the particular features of damages awards in trespass cases and on procedural aspects of such awards.

Damages Awards

Compensatory damages awards contrast with scheme payments in various ways. Most obviously and importantly, they are dramatically higher in quantum. A quick survey of eight abuse cases in

⁹⁸ This remains the case in all Australian jurisdictions even after the introduction of proportionate liability provisions: personal injury cases are still subject to the joint and several liability rule. See eg, *Civil Liability Act* 2003 (Qld) s 28(3).

Australia since 2004 yields awards of between \$230,000 and \$2.4million, the ‘average’ compensatory sum falling around \$580,000.⁹⁹ This is nearly eight times the maximum amount available under any of the existing schemes and nearly three times the maximum amount (\$200,000) currently being modelled by the Royal Commission.¹⁰⁰ Judicial awards reflect both the devastating reality of the harms suffered by victims - personal *and* economic - and the impact of the corrective justice norm at work within private law. This norm, as we indicate further in Part IV, mandates full restoration of a victim so as to erase the effects of the wrong as best as can be done through money, not simply a sum that meets the victim’s current *needs* via ‘financial assistance.’

Judicial awards are also more transparent in the way they are calculated and more subtly individuated to a victim’s personal circumstances. Accepting that precision is impossible, they discriminate clearly between different types of loss suffered and itemise harm under different heads: loss of amenity (physical injury, psychiatric harm, and emotional distress), pain and suffering, loss of past and future earnings, medical expenses and care costs (past and future). Although DART claims to provide ‘individually tailored outcomes for complainants’¹⁰¹ and grades different ‘categories’ of abuse, the level of individuation in awards is clearly much lower than at law. The grading system also focuses on the nature of the incident(s) in question, not on particular heads of loss a victim has suffered. This makes it hard to know why a given reparations payment has been made at the level selected. Higher degrees of loss individuation, though more administratively involved, express a stronger respect for the *individual* and devote concern to the victim in all aspects of his or her subjective hurt, rather than treating that person as just one member of a broader category. Whilst judicial damages may include a sum purporting to compensate for the particularly hurtful or humiliating aspects of a defendant’s conduct (‘aggravated damages’), the reparation schemes under consideration do not transparently address the same harm.¹⁰² Aggravated damages address serious personal indignities and are added to amounts for physical and psychiatric harm, mental distress, and pain and suffering. DART does make reference to the abuser’s rank as a relevant factor in calculating payments (which we speculate may be material to a victim’s humiliation), and the Royal Commission Redress scheme outlines factors relevant to severity of abuse, severity of impact and distinctive institutional factors, but otherwise there is no reference to equivalent heads of recovery in the various schemes. None of the schemes appears to compensate a victim’s loss of earnings.

Another key difference is that damages for trespass to the person can include an exemplary element. Courts may add exemplary damages to compensatory awards when there has been a particularly egregious infringement of a victim’s rights. The function of such awards is to deter wrongdoing and express firm institutional (judicial) disapproval of the acts in question. Such

⁹⁹ *SB v New South Wales* [2004] VSC 514 (\$281,000); *AM v KW* [2005] NSWSC 876 (\$445, 000); *McCrae v The Boy Scout Association* [2007] NSWDC 196 (\$501, 000 against Scout Association; \$767, 000 against abuser, including \$100,000 exemplary damages); *Varmedja v Varmedja* [2007] NSWDC 385 (\$233,000, including \$50,000 exemplary damages); *XY v Featherstone* [2010] NSWSC 1366 (\$2.4 million); *Tusyn v State of Tasmania (No 3)* [2010] TASSC 55 (Damages not determined. Claim for \$700,000 - judge indicated damages at trial likely to be in the ‘hundreds of thousands’); *GGG v YYY* [2011] VSC 429 (\$267,000, including \$30,000 exemplary damages); *K v G* [2010] QSC 13 (\$630,000). In 3 cases, these sums included elements of exemplary damages amounting to a total of \$180,000. In calculating an average global sum, exemplary elements have been excluded and the appropriate compensatory award in *Tusyn* has been notionally set at \$300,000.

¹⁰⁰ Significant ‘caps’ on personal injury damages apply in Australian jurisdictions, but remain extremely generous when compared to the reparations schemes we examine. Eg, in QLD, damages for loss of earning capacity are based on a rate capped at three times the national average earnings; and damages for non-economic loss are capped at \$250,000 (adjusted - \$294,500 from July 2010).

¹⁰¹ *5th Report*, 28.

¹⁰² *New South Wales v Ibbett* [2006] HCA 57.

awards are available against an institution even when its liability is vicarious, not personal,¹⁰³ and they are especially common in cases involving the misuse of State power. They are not generally available against an abuser where the abused has been imprisoned or otherwise punished, for fear of imposing a double penalty. Such deterrence aims are not easily addressed in reparations schemes, the focus of which is resolving past harms. They are better left to formal legal institutions, whether criminal or civil. This not therefore a sphere in which we suggest reparations schemes may fruitfully mimic private law's approach.

Subject to some statutory exceptions, damages awards are made in a lump sum, once-and for all.¹⁰⁴ This can cause under-compensation in cases in which long-term medical prognoses are unclear, but has the benefit of giving victims a level of certainty and full control over their compensation, including control over their future care, including medical care. By contrast, under current church and DART arrangements, there appear to be merely non-binding commitments to ensure the on-going provision of support services. This may give rise to the sense that victims are beholden to the very institution accepting responsibility for their abuse, and that victims must continually come begging, cap-in-hand, to their abuser.¹⁰⁵ The *ex-gratia* nature of the commitment undermines both victims' dignity and autonomy, both of which are centrally implicated in the injustices in question. Victims should be given the choice of accepting a significantly higher compensatory sum under existing schemes to provide for their *own* future needs, rather than having to rely on discretionary provision.¹⁰⁶ This is an aspect of regaining *control* over their lives and respecting the fact that remedies are secondary *entitlements* reflecting victims' prior *rights*. The Royal Commission Redress proposals moot the possibility of providing monetary awards to victims in instalments, in order to offset some of the risks of imprudent dissipation, but they also acknowledge the desire of many victims to receive a single, lump sum payment.¹⁰⁷ In relation to victims' needs for counselling and psychological care, the Royal Commission suggests providing funding rather than services, thus promoting choice and flexibility for victims rather than requiring them to attend a particular service. This accords with our own view and with the practice of private law.¹⁰⁸

As part of any lump-sum award, Courts grant interest from the date of the abuse to the date of judgment, designed to account for the fact that victims have been kept out of relief to which they are *entitled*. Once it has been determined as a matter of justice that a person was wronged and that the wrong should be made good, the law considers it right that their remedy should notionally be backdated to the date of the event, not simply made available from the date of decision. Interest is not available under any of the reparations schemes, which risks leaving victims under-compensated.

Procedural Aspects

Judicial awards aspire to provide rough equivalency between like cases through the system of precedent. This is part of a basic commitment to equality of treatment for victims before the

¹⁰³ *New South Wales v Ibbett* [2006] HCA 57 at [43-4]; *New South Wales v Bryant* [2005] NSWCA 393.

¹⁰⁴ There are now some exceptions involving interim, provisional payments and (voluntary) structured settlements in Australia. See Barker, Cane, Lunney & Trindade *The Law of Torts in Australia* (OUP, 2012), 694-5. This pattern is replicated in the UK, where there is now provision in some cases for Courts to make compulsory periodic payment orders.

¹⁰⁵ Ellis, [18.3].

¹⁰⁶ A common law analogue is *Griffiths v Kirkmeyer* (1977) 139 CLR 161 where damages in negligence are available to compensate the plaintiff. Loss is constructed by reference to the plaintiff's needs (past and future) created.

Subsequent statutory provisions, eg s15 *Civil Liability Act 2002* (NSW) reflect this core concept of needs-based losses.

¹⁰⁷ Consultation Paper, 6.5. Note that specific recommendations on this issue have not been made.

¹⁰⁸ Consultation Paper, p123.

law.¹⁰⁹ Broad aspirations of this type appear in DART to the extent that categories of abuse and their correlative payments are tiered, but the practical utility of this measure is limited by the impossibility of determining the actual facts triggering awards, given the anonymity of the awards system. Similarly, the practice in clergy abuse cases of keeping awards secret is likely to obstruct equal treatment and undermine public confidence. Indeed, this practice could be being used as a cynical tactic by the Church to keep levels of compensation down. If reparations systems are to aspire to provide equal treatment to abuse victims and to provide them with compensation in the true sense, the main features of reparations schemes (maximum payments, for example) should be designed with a closer eye on the legal precedents; and when awarding amounts under reparations schemes assessors should in any event be bound to consider previous reparations awards in similar cases under those schemes.

Decisions of courts are independent. The *Melbourne Response* Commissioners, although experienced lawyers, are appointed and paid by the Church, as are members of the Compensation Panel. A similar critique may be made of *Towards Healing*, under which the Assessor and any subsequent mediator or facilitator are appointed or approved by the Director of Professional Standards, who is appointed by the Church. The Assessor under DART is appointed pursuant to the Terms of Reference, ultimately within the purview of the Attorney General, although the scheme is funded by the Department of Defence.¹¹⁰ Without in any way casting doubt on the integrity or competence of current decision makers, all schemes could usefully learn the lesson that justice must not only be done, but *be seen to be done*¹¹¹ if it is to be legitimised in a public sense. Recognising this, the Royal Commission Redress model recommends an independent decision-making body with the necessary ‘mix of legal, medical, psychosocial and similar skills’.¹¹² However, as shown by our critique of DART above, the word ‘independent’ in this context can mean different things to different people. We suggest that decision makers be wholly independent in terms of mechanism of appointment, institutional loyalty and funding.

Courts provide public reasons for their awards. Not only does this promote consistency, it is an important aspect of legitimacy and accountability in the use of power. By contrast, there is no commitment to providing public reasons for awards under current reparations schemes. Although there is a limited right to reasons in *Towards Healing*, this relates only to the finding that the complaint is true, not to any reparations decision.¹¹³ DART issues three-monthly reports to Parliament.¹¹⁴ However, details of individual decisions are not made available. The Royal Commission Redress proposals similarly suggest annual publication of data to meet requirements of transparency and accountability, in addition to its other processes.¹¹⁵

A related aspect concerns the reviewability of decision-making. Judicial awards are always subject to appeal, whilst awards under DART and church initiatives are not. The Royal Commission Redress proposals note the relevance of appeal rights, leaving the particular details

¹⁰⁹ Sadly, the common law commitment to consistency of treatment in Australia is now undermined by statutory interventions imposing different levels of damages cap (and providing for different types of damages award) in different jurisdictions. Exactly the same injury can hence yield different compensation awards within Australia, which is a disgrace. The common law system shows more integrity in this respect than the heavily politicised forms of statutory intervention.

¹¹⁰ *Ist Report*, Foreword.

¹¹¹ *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, per Lord Hewart CJ.

¹¹² Consultation Paper, p171.

¹¹³ *Towards Healing* [40.9], [40.9.1] and [40.9.3].

¹¹⁴ *Defence Abuse Response Taskforce: Appointment of Taskforce Chair and Taskforce Terms of Reference* December 2012.

¹¹⁵ Consultation Paper, p175.

of any such rights to be identified and determined in the drafting of the ultimate scheme.¹¹⁶ The possibility of reviewing the merits of an award is another important aspect of public legitimacy even in cases where awards are made by a truly independent body. In respect of bodies that might appear to lack such independence, it is vital.

Finally, although judicial awards are subject to time bars, all limitations statutes contain discretionary provisions for the extension of time limits. Justice is always in principle open for business. By comparison, DART appears to have adopted a non-extendable filing deadline. This apparently ignores lessons that judges have accepted about the devastating effects that psychiatric illness can have on a person's capacity to protect their own interests. It must be acknowledged that the ADF has worked in partnership with the Australian Human Rights Commission, Sex Discrimination Commissioner in attempting to transform the organisation and that there exists the *Sexual Misconduct Prevention & Response Office*.¹¹⁷ However, no on-going scheme of reparation appears to be intended.

Taken in the round, private law hence provides a set of informative contrasts with reparations schemes in cases of serious abuse. It provides a framework and remedial system expressing the strongest respect for victim rights, accountability and personal autonomy, and a commitment to types and levels of compensation that are not even approximated in current schemes. It also provides an awards system that is independent, reasonably well individuated, probably more consistent, much more transparent, and open to review.

We do not suggest that *all* reparation schemes should make awards comparable to those available at private law. Where such schemes are tax-payer funded and designed to ensure basic levels of welfare provision (as in the social security system, or under road accident or criminal injury compensation schemes), it may well be appropriate to make lower awards and reduce individuation so to increase efficiency, coverage and accessibility. But it is vital to remember that *The Melbourne Response* and *Towards Healing* are *not* general taxpayer-funded welfare schemes. DART is indirectly taxpayer-funded (because it is a public body that pays) but is nothing like a social security scheme, or a state scheme to support victims of crime. All these schemes, including DART, are private¹¹⁸ schemes operated by those implicated in, or accepting responsibility for admitted wrongs. Payments are offered by Defence and the Catholic Church not as a matter of general social conscience, but in substitution for their moral and legal responsibilities. The same observation is possible in relation to the Royal Commission Redress proposals. The proposals are predicated on the participating institutions having a 'moral or social responsibility to address the harm done.'¹¹⁹ If implemented, the scheme is to be funded by non-government institutions subject to claims, together with government contributions in respect of its own responsibilities, combined with last-resort contributions from both government and possibly non-government sources.¹²⁰ The Royal Commission Redress proposals are similarly, therefore, not a system of social security or welfare entitlement. They articulate principles for discharging moral obligations generated by wrongdoing.

In Part IV below we argue that the appropriate guiding principle to follow in such schemes is that of corrective justice. Any institution implicated in, or accepting responsibility for injustice,

¹¹⁶ Consultation Paper, p173.

¹¹⁷ <http://www.defence.gov.au/sempro/> (1 July 2014)

¹¹⁸ The word private here indicates that the scheme addresses a potential private law responsibility owed or accepted by the institution in question (including the ADF). Public bodies have many private law responsibilities that have nothing to do with the special 'public' status or governmental functions.

¹¹⁹ Consultation Paper, p152.

¹²⁰ Consultation Paper, p 29.

should observe the remedial norms that corrective justice demands, not just deal with victims' most immediate needs, or bargain down the sums payable as if remedy were a matter of *ex gratia* discretion. There is, therefore, a critical distinction between general social welfare schemes and private reparations schemes created and funded by institutions responsible, or accepting responsibility, for injustices. The latter ought more closely to map the features of private law solutions.

III. STOLEN WAGES

A. Stolen Wages: History and Reparative Scheme

Aboriginal workers in Australia were historically paid less than their white counterparts under discriminatory employment practices.¹²¹ A particular aspect of this system was statutory schemes and administrative policies making it possible for governments to control Aboriginal people's money. Different states had different regimes, but all involved taking money from Aboriginal people and placing it, via a system of compulsory deposit, in statutory trust accounts controlled by the government. This system of supremacy was possible because, in addition to other controls exercised more generally over Aboriginal people, governments were able to exercise jurisdiction over social welfare payments made to Aboriginal people and some types of wages paid to them. An example is the network of regulation that existed in New South Wales.¹²²

Aboriginal people fell under the purview of the Aborigines Welfare Board (the Board)¹²³ which pursuant to the *Aborigines Protection Act* 1909 (NSW) had statutory duties, including to exercise 'general supervision and care over all matters affecting the interests and welfare of aborigines', to manage and regulate reserves and Stations upon which Aboriginal people resided and to provide for the custody, maintenance and education of Aboriginal children. Additionally, and ironically, the Board was 'to protect [aborigines] against injustice, imposition, and fraud.'¹²⁴ This legislation was repealed in 1969 and the Board abolished.

The Board forced aboriginal or mixed race children into labour¹²⁵ pursuant to so-called 'apprenticeships' in which the child could be indentured in return for a small weekly wage, described as 'pocket money'. The level of wages paid to Aboriginal apprentices overall, themselves artificially low,¹²⁶ was set by regulations made under the legislation. The balance of the week's wages was to be paid to the Board and placed in a trust account until the apprentice was paid out on the completion of his or her apprenticeship, or such other time as approved by the Board.¹²⁷ The Board was entitled to spend the wages in the interests of the apprentice as it saw

¹²¹ Eg, (in QLD) *Bligh v Queensland* [1996] HREOCA 26; (1996) EOC ¶92-848; *Baird v Queensland* (2006) 156 FCR 451; *Baird v Queensland (No 2)* [2006] FCAFC 198; *Douglas v State of Queensland (No 2)* [2006] FCA 1288 (unreported Collier J, 28 September 2006).

¹²² See S Brennan and Z Craven 'Eventually they get it all ...' Government Management of Aboriginal Trust Money in New South Wales' [2007] *UNSWLRS* 45. See also Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) (Senate Inquiry).

¹²³ The Board's precursor (the Aborigines Protection Board) was established in 1883. It was renamed in 1940.

¹²⁴ Brennan and Craven above n 122, 7

¹²⁵ s11(1) *Aborigines Protection Act* 1909 (NSW). There was an obvious interaction between the Board's right to indenture children into labour and the policies of forced removals suffered by the Stolen Generations, documented in HREOC 1997 *Bringing Them Home*. One policy allowed for the removal of children, the other for them to be forced to work. See also V Haskins '& so we are 'Slave owners'!: Employers and the NSW Aborigines Protection Board Trust Funds' (2005) 88 *Labour History* 147.

¹²⁶ They were paid less than Child Welfare Department apprentices for many years: Haskins *ibid*, 149.

¹²⁷ Brennan and Craven above n 122, 7. The age at which an apprenticeship was completed was originally set at 21, at which point a person had the right to leave their employer. This was reduced to 18 years: s3(a)(ii) *Aborigines*

fit.¹²⁸ Apprentices would often discover at the end of their service that their employer had not been making wage payments to the Board.¹²⁹ Some employers may have fallen into arrears, or paid no wages at all. In result, at the end of an apprenticeship, an apprentice requesting a withdrawal from the trust would find out that no funds were held on his or her behalf.

Haskins reports that wages were held in a single undifferentiated interest-bearing ‘Trust Account’ by the Savings Bank department and then transferred to the Rural Bank department of the Government Savings Bank in 1923.¹³⁰ In reality, much money collected and held on trust remained in government hands and was never paid out. Poor record keeping, the risk of fraud,¹³¹ administrative inaction and the practical difficulty of approaching the Board without their employer or ex-employer’s support,¹³² meant that Aboriginal workers stood little chance of success in accessing their money. When the Board was disbanded in 1969, funds remained undisbursed. The trust accounts were closed and remaining funds transferred to the NSW Department of Youth and Community Services (YACS). As highlighted by the NSW Public Interest Advocacy Centre, some children under the jurisdiction of the Board when it closed in 1969 were transferred to the NSW Child Welfare Department (later YACS) and these trust funds continued to be administered after 1969. The significance of this latter fact, as is explored below, is that these post-1969 trust funds are not covered by the NSW *Aboriginal Trust Fund Repayment Scheme* (ATFRS) and thus remain outside the mechanism of reparation.

On 11 March 2004, the NSW Premier The Hon Mr Bob Carr apologised to the Indigenous People of NSW, undertook to return any monies ‘established’ as being owed to them¹³³ and enacted the ATFRS. ATFRS comprised a panel, which made recommendations on repayments to the Minister for Aboriginal Affairs (‘Minister’). The funds eligible to be repaid were those held in trust accounts by the Board between 1900 and 1969. Although ATFRS started out in 2004 as a system designed to repay amounts actually held (or approximation thereof),¹³⁴ it was amended in 2009 to become a system of *ex gratia* payment.

All successful claimants received \$11,000, to be shared between eligible descendants where the claim was not brought by the person who did the work, but by their estate. This payment was made on an *ex-gratia* basis, within the Minister’s discretionary powers and without any admission of liability.¹³⁵ Those who had previously claimed under the ATFRS and received less than \$11,000 were entitled to have their settlement topped up to reach \$11,000. This sum was said to

Protection (Amendment Act) 1940 (NSW). As pointed out by Brennan and Craven, the extent to which this right to emancipation could realistically be exercised was often limited, if only by the fact that an aboriginal person may not have known that it existed. See also *Senate Inquiry*, [4.62].

¹²⁸ s11(1) *Aborigines Protection Act 1909* (NSW). Brennan and Craven above n122 p10 fn 25 note that the Board’s power to spend trust account money survived through various statutory modifications. For example post 1944 expenditure could be made, ‘towards the maintenance, advancement, education or benefit of such ward or ex-ward’ at any time before an apprentice attained the age of 21 years, while any balance remaining ‘should be paid to the ex-ward attaining the age of 21 years’: Regulation 23A inserted by regulations made on 21 April 1944 under the *Aborigines Protection Act 1909* (NSW).

¹²⁹ *Senate Inquiry* [4.63].

¹³⁰ Haskins above n 125, 149.

¹³¹ *Senate Inquiry*, [4.41] and [4.49] ff.

¹³² Haskins, above n 125, 161.

¹³³ NSW, *Parliamentary Debates*, Legislative Assembly, 11 March 2004 item 12 (aboriginal trust funds) (Bob Carr). Apology delivered by the Prime Minister the Hon Kevin Rudd MP to Australia’s Indigenous peoples, 13 February 2008 <http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples> (2 June 2014).

¹³⁴ Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (February 2006) Appendix A.

¹³⁵ Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (June 2009) (*Guidelines*), 12.3.

represent the average sum of all repayments made prior to the amendments to the ATFRS in 2009, plus a ‘compensatory component for the hurt caused by not having control or use of the money during the time it was held by the Boards.’¹³⁶ This \$11,000 limit, whilst operating perhaps to improve the position of some plaintiffs, also operated to limit the position of other claimants who could demonstrate that they were owed more than that under the trust scheme.¹³⁷

In order to claim, ATFRS required ‘strong and reliable evidence showing that money [was] owed from a government controlled trust-fund account.’¹³⁸ In the first instance, this evidence was sought from the documentary sources held by or on behalf of the Board. As noted by the Senate Inquiry into Stolen Wages,¹³⁹ this process was necessarily limited by insufficient resources and the excruciatingly incomplete documentary record on which it was based. The rules of evidence were stated not to apply to assessment of applications, and ATFRS was directed to consider only evidence which ATFRS was satisfied is ‘relevant to the recommendation/s which ...[it] shall make and which [the relevant officer] is satisfied is reliable.’¹⁴⁰

Under the ATFRS, when there was insufficient evidence to substantiate an application under the scheme, the claimant bore an evidential onus to satisfy ATFRS that a repayment was warranted, relying on affidavit or oral evidence testifying as to their working life, government benefits, and any dealings with their trust fund account.¹⁴¹ Pursuant to clause 15 of the 2009 Regulations, if ATFRS was satisfied that there was certainty, strong evidence, or strong circumstantial evidence that funds were paid into a trust fund account between 1900 and 1969 and no evidence, or no reliable evidence, that it was paid out or expended, then a recommendation should be made to the Minister for an *ex gratia* payment of \$11,000. If the panel was not satisfied of these matters then a recommendation against payment was required.¹⁴² ATFRS closed on 31 December 2010. The ATFRS also included practical support and counselling for claimants.¹⁴³

B. Stolen Wages Reparation: Private Law Analogues

Practically speaking, the barriers to the success of any private law claim for stolen wages will in part replicate the barriers faced by applicants under the ATFRS, or at least the original version of that system. As with many cases of institutionalised abuse, there is a lack of evidence available in support of claims. This is despite record keeping obligations on the Board under the *Audit Act* 1902 (NSW) in respect of the administration of trust accounts. For example, these required payments into the account to be accompanied by vouchers signed by the relevant accounting officer detailing a full and accurate description of the services for which such moneys had been received,¹⁴⁴ and a correlative obligation to document payments out via the preparation of a

¹³⁶ *Guidelines*, Attachment Form One: Final Proforma Letter and Form to be sent to claimants requesting electronic banking details and acknowledging a repayment is being made.

¹³⁷ V Mawuli ‘Stolen Wages Evidentiary Challenges for Claimants’ (2010) 7 *ILB* 8, 10. Under the pre-2009 scheme, claimants were entitled to the full amount owed, if able to establish entitlement. In September 2009, claimants who had registered their claims before the amendments were introduced were given the option of having their claims assessed under the old rules if they wished, provided they made a further application to have their application assessed in this manner within 28 days and established that it would be in the interests of justice or equity for the old guidelines to apply.

¹³⁸ PIAC (V Mawuli) *A Fairer System: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into a review of Government compensation payments* (9 June 2010), 8. See *Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme* (June 2009) 5.1.1.

¹³⁹ *Senate Inquiry* [7.92]-[7.101].

¹⁴⁰ *Guidelines*, 4.2, 5.5.

¹⁴¹ V Mawuli ‘Procedural Challenges in the Stolen Wages Scheme’ *PIAC Bulletin* No 31 May 2010, 1.

¹⁴² *Guidelines*, 15.4.

¹⁴³ *Senate Inquiry*, [7.83].

¹⁴⁴ s28(a) *Audit Act* 1902 (NSW), discussed in Brennan and Craven above n 122, 53. See also *Senate Inquiry*, [4.26].

warrant stating the amount and purpose of a withdrawal.¹⁴⁵ Despite such statutory requirements, information is lacking and the paper trail is often cold. Added to this is the barrier of limitation periods having elapsed and the significant financial burden on Aboriginal people in pursuing claims through the Courts. The discussion which follows does not advocate a private law solution to stolen wages.¹⁴⁶ Again, we draw attention to the normative framework in use and highlight the disparity in remedial outcomes between payouts under AFTRS and at law, were a legal claim to be possible. Two types of private law claim and their associated remedies will be considered: actions for breach of fiduciary duty and trust, and unjust enrichment claims by way of *quantum meruit*.

Work has already been done¹⁴⁷ tentatively demonstrating the possibility of proving the elements necessary to establish a fiduciary relationship owed by governments to specific claimants, focusing on the economic and employment interests of claimants under the relevant legislation,¹⁴⁸ or applying Mason J's well known dictum from *Hospital Products v USSC*.¹⁴⁹ The latter purports to identify the 'essence' of a fiduciary relationship according to the presence of the following elements, which Walker argues are established, at least within the Queensland statutory scheme: an undertaking to act in the interests of Aboriginal workers; a finding that the workers were entitled to expect a certain standard of conduct; disparity in power between the government and indigenous employees, and vulnerability.¹⁵⁰ Nonetheless, the litigation history shows a poor success rate in proving a fiduciary relationship in this context, albeit that the arguments around the narrower economic interests of the claimants arising out of the statute seem more robust than those historically made, for example, on the basis of guardian and ward.

The fiduciary's obligation is one of loyalty. It is a prescriptive obligation 'not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach.'¹⁵¹ In relation to the 'no conflict rule', the obligation of the fiduciary is not limited to cases of *actual* conflict, where the fiduciary prefers personal interest or takes actual advantage, but includes 'situations involving a *potential* for personal interest...or a *potential* for breach of duty to one principal where conflicting duties are owed to different principals.'¹⁵² Equity prohibits the fiduciary merely placing themselves in a position of conflicting¹⁵³ duty and duty (or duty and interest), unless there is a full disclosure of material facts and informed consent

¹⁴⁵ s38(1) *Audit Act* 1902 (NSW), discussed in Brennan and Craven above n 122, 53 and *Senate Inquiry*, [4.26].

¹⁴⁶ It should be noted that, at least in relation to claims falling outside the AFTRS (1969 trust funds) such private law claims may continue to be necessary.

¹⁴⁷ RJ Walker 'Resolving the Stolen Wages Claim in Queensland: The Trustee's Non-Fiduciary Duties' (2008) 2 *J Eq* 77, 93ff and S Gray 'Holding the Government to Account: The "Stolen Wages" Issue, Fiduciary Duty and Trust Law' (2008) 32 *MULR* 115, 130ff. See also M Thornton and T Luker 'The Wages of Sin: Compensation for Indigenous Workers' (2009) *UNSWLJ* 647, 655ff, although the analysis is less optimistic.

¹⁴⁸ Gray, *ibid*, 131 and 139-140, taking limited support from *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136, 343-8 (Gray J) for the existence of fiduciary obligations. See also *Paramasivam v Flynn* (1998) 90 FCR 489.

¹⁴⁹ (1984) 156 CLR 41, 96.

¹⁵⁰ Walker, above n147, 96-99.

¹⁵¹ *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ) approved in *Pilmer v Duke Group Ltd (in liquidation)* (2001) 207 CLR 165, 198 [74] (McHugh, Gummow, Hayne and Callinan JJ).

¹⁵² *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102, 266 (Edelman J). See *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 392 (The Court); *Breen v Williams* (1996) 186 CLR 71, 135 (Gummow J); *Birtchnell v Equity Trustees and Agency Co Ltd* (1929) 42 CLR 384, 408 (Dixon J); *Boardman v Phipps* [1967] 2 AC 46, 124 (Lord Upjohn); *Hospital Products v USSC* (1984) 156 CLR 41, 103 (Mason J); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, [79] (McHugh, Gummow, Hayne and Callinan JJ).

¹⁵³ Of course, this will in part be a function of the *scope* of the duty in question. See *Howard v Commissioner of Taxation* [2014] HCA 21, [34] (French CJ and Keane J).

to the breach is obtained from the principal.¹⁵⁴ Assuming that the relationships in question gave rise to no risk of duty/duty conflict, the clear breach in view is a conflict of duty and interest. To the extent that trust funds were misappropriated into government hands (likely into consolidated revenue) for any purpose other than trust purposes, there is a breach of fiduciary duty. Such a transfer or application of funds is vulnerable to reversal via the personal remedy of account of profits.¹⁵⁵ However, this depends on identifying the value of the gain received by the wrongdoer. Equitable tracing is required showing transfer of value into the hands of the wrongdoer, following which an order is made requiring disgorgement of that gain.

Loss-based remedies are also possible – monetary awards being available for breach of trust both by way of ‘substitutive compensation’ (to enforce a defendant’s primary duty of loyalty) and as ‘reparative compensation’ (to make good a loss caused by the defendant’s breach).¹⁵⁶ This is significant. Wages were held for apprentices pursuant to trusts established under the *Aborigines Protection Act 1909* (NSW) for the ‘maintenance, advancement, education or benefit of ...[a] ward or ex-ward.’ Any unauthorised payments out (irrespective of to whom), were in breach of trust and substitutive compensation is available to force the trustee to perform its primary obligation to restore the value of an asset dissipated without authority.¹⁵⁷ The same obligation to pay substitutive compensation arguably also applies to custodial fiduciaries,¹⁵⁸ and would capture government breaches regarding funds held pursuant to any fiduciary obligation based on statute. The potential remedial advantage offered by substitutive compensation is that it may bridge the evidential gap. It is not necessary to demonstrate an amount *received* by the breaching trustee or fiduciary, which must be included in the account. The obligation is, rather, simply to restore the fund to the position before breach, before payment out. This obligation is quantified at the current market value of the missing money, determined at the date the account is taken. The causation threshold is low. All that must be shown is that there *was* an unauthorised disbursement. No other counterfactual inquiry is relevant, because the object of the court is not to attempt to restore the plaintiff to the position (now) as if no wrong had occurred.¹⁵⁹ Normal causal hurdles such as ‘but for reasoning’ and the doctrine of ‘intervening acts’ are irrelevant.¹⁶⁰ An award of substitutive compensation can, therefore, capture the original value in the account if that can be established by evidence.

A restitutionary claim based on unjust enrichment may also be possible, although plaintiffs are obstructed by both evidential obstacles and limitation periods. Although some claims based on mistake¹⁶¹ may be arguable in respect of events long buried by time,¹⁶² the cause of action will

¹⁵⁴ *Maguire v Makaronis* (1997) 188 CLR 449, 461 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 392 (the Court); *Breen v Williams* (1996) 186 CLR 71, 108 (Gaudron and McHugh JJ).

¹⁵⁵ *Warman v Dwyer* (1982) 182 CLR 544, 560-561 (Mason CJ, Brennan, Deane, Dawson, Gaudron JJ).

¹⁵⁶ S Elliott *Compensation Claims Against Trustees*, DPhil Thesis, University of Oxford, 2002; L Smith, ‘The Measurement of Compensation Claims against Trustees and Fiduciaries’ in E Bant and M Harding (eds) *Exploring Private Law* (CUP, 2010), 363-376; J Glister ‘Equitable Compensation’ in J Glister and P Ridge (eds) *Fault Lines in Equity* (Hart, 2012) 143-168; C Mitchell ‘Equitable Compensation for Breach of Fiduciary Duty’ (2013) 66 *CLP* 307. Note that the reparative-substitutive distinction is not universally accepted: See JD Heydon et al *Meagher Gummow and Lehane’s Equity Doctrines and Remedies* (5th edition, Sydney, 2015) chapter 23, 867-868.

¹⁵⁷ *Re Dawson* [1966] 2 NSW 211, 215; *O’Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277 (Spigelman CJ, Priestley and Meagher JJA agreeing); *Agricultural Land Management Ltd v Jackson* [No 2] [2014] WASC 102 [333]-[359], [368]-[375] (Edelman J).

¹⁵⁸ *O’Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277 (Spigelman CJ, Priestley and Meagher JJA agreeing).

¹⁵⁹ See J Glister above n156, 144-147.

¹⁶⁰ *Maguire v Makaronis* (1997) 188 CLR 449, 468.

¹⁶¹ *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353.

not systematically apply to many stolen wages claims. Time in most limitation statutes¹⁶³ runs from when the mistake was with reasonable diligence ‘discoverable’ and from when it is declared by a later judicial decision.

The elements of an action for restitution are usefully described by answering the following generic questions establishing the presence of unjust enrichment:¹⁶⁴ (a) is the defendant enriched? (b) is the enrichment at the plaintiff’s expense? and (c) is the enrichment unjust, in the sense that there is a recognised unjust factor present in the circumstances? The following discussion focuses on enrichment and unjust factors. The benefit provided by apprentices comprised service, hence a claim for *quantum meruit* is in view. Enrichment is not likely to be disputed. The services of the apprentices were no doubt requested and supplied by the Board in consequence of that request. Request and acceptance are powerful indicia of a defendant’s enrichment. In any case, the services were most likely necessary and therefore ‘incontrovertibly’ beneficial - had an apprentice not been engaged, someone else would have been.¹⁶⁵ Recall that the stolen wages configuration involved three parties. The apprentices would work for their employers and it was intended that wages should be paid by the employer to the Board to be paid out on the apprentice being liberated from indenture. In identifying an unjust factor, failure of basis is likely systemically to be present. A failure of basis in this sense is a ‘failure to sustain itself of the state of affairs contemplated...’ for the transfer of value.¹⁶⁶ Whether the restitutionary claim is against the original employer (in the case of wages not collected and paid into trust) or the government (in the case of wages not paid out to the apprentice), there has been a failure of basis because the objective basis on which the work was provided (receipt of payment) has failed.

Alternatively, the ‘qualifying or vitiating [unjust] factor’¹⁶⁷ might be duress. Duress comprises illegitimate pressure that has provably caused the plaintiff to confer the benefit.¹⁶⁸ A difficulty in proving the pressure was ‘illegitimate’ is that the policies of forced removals, compulsory apprenticeship and control of money were legal. There is a nascent doctrine of ‘lawful act’ duress¹⁶⁹ under which some lawful pressures might be regarded as illegitimate for the purposes of

¹⁶² *Kleinwort Benson v Lincoln* [1999] 2 AC 349. See also L Smith ‘The Timing of Injustice’ in D Dyzenhaus and M Moran *Calling Power to Account: Law Reparations and the Canadian Head Tax Case* (University of Toronto Press, 2005) 287-306, 297-299.

¹⁶³ *Limitation Act 1969* (NSW) s56 (1).

¹⁶⁴ In Australia, *AFSIL v Hills Industries* [2014] HCA 14 [14] (Hayne, Crennan, Bell, Kiefel and Keane JJ) reaffirms that unjust enrichment does not provide ‘a sufficient premise for direct application in a particular case’, so these are to be understood as broad, organising principles operating at a high level of generality. They usefully ‘direct attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or bills of equity.’ *Lamson (Australia) Pty Ltd v Forstescue Metals Group Ltd [No 3]* [2014] WASC 162, [51] (Edelman J). Following *Pavey & Matthews v Paul* (1987) 162 CLR 221 a majority of the High Court recognised that the *forms of action*, including relevantly *quantum meruit*, form part of unjust enrichment. Deane J at 256-7 described the idea as a ‘unifying legal concept’ with an explanatory function helping to determine restitutionary obligations in new or developing categories of case.

¹⁶⁵ *Brenner v First Artists’ Management* [1993] 2 VR 215; *Benedetti v Sawiris* [2013] 3 WLR 351.

¹⁶⁶ *Roxborough v Rothmans* (2001) 208 CLR 516.

¹⁶⁷ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 (the Court).

¹⁶⁸ *Crescendo Management v Westpac* (1988) 19 NSWLR 40, 45-46 (McHugh JA). A third element is mooted, namely that the plaintiff had no reasonable alternative to giving in to the threat, but this may simply provide objective evidence of the causative impact of the illegitimate pressure.

¹⁶⁹ *Australia and New Zealand Banking Group v Karam* [2005] 64 NSWLR 149 limits duress to threatened or actual unlawful conduct. See also *Mitchell v Pacific Dawn* [2006] QSC 198, [20]-[25] (Chesterman J); *Commercial Base Pty Ltd v Watson* [2013] VSC 334, [34]-[35] (Almond J). In *A v N* [2012] NSWSC 354 [509] Ward J suggests that even if lawful act duress exists, there is a high threshold to meet. See in support of lawful act duress: *Westpac Bank v Cockerill* (1998) 152 ALR 267; *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASC 36 [25] (McLure P, Newnes JA agreeing); *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] 2 All ER (Comm) 855, 861-6 (Cooke J); *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 718-9 (Steyn LJ). Although the

a restitutionary claim, but any such argument would be tenuous at best. The welfare and historically paternalistic context of the Board's operations may mitigate against a finding that 'there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports.'¹⁷⁰ In extreme cases, individual litigants may establish actual, illegal duress to the person in the sense of a threat to physical welfare, which is always illegitimate pressure giving recovery if it causes the plaintiff to confer the benefit.¹⁷¹

The measure of relief in restitution is presumptively the market value of the service at the time it was rendered,¹⁷² which in many cases would yield rates of recovery well above those paid under ATFRS. Interest is also available on the sum as from the date of the unjust enrichment. The original rates set for work are, in the absence of a binding contractual arrangement, only evidence of its value to the person benefitting from it and do not set a final ceiling on the amount a court can award. Other advantages of restitutionary remedies for work done, compared with ATFRS, are that their availability is not limited to a claim against funds held up until 1969, and the question whether or not funds were actually paid into those accounts in the first place is completely irrelevant.

IV. PRIVATE LAW LESSONS FOR REPARATION

Looking past what private law *cannot* do, reparations schemes should learn from what it *can*. The comparisons between existing administrative arrangements and the remedies that private law might offer, if not obstructed by technical matters, delay, expense and cost, are informative. Private law's strengths lie in understanding the nature of the injustices in question, the importance of the human interests at stake and the appropriate way to respond remedially. We argue that these lessons, which appear to have been forgotten in the current pragmatic rush to political compromise, should be transferred into the (re)design of private reparations schemes. We consider lessons flowing both from the norms of corrective justice that infuse the private law system, and more general lessons about institutional integrity.

A. Lessons from Corrective Justice

The literature on corrective justice is vast and disparate and there are differing conceptions of the idea,¹⁷³ but one thing on which most writers agree is that the norms of corrective justice are unique and different to the norms of distributive welfare. Corrective justice seeks to rectify the injustices done by one person (or institution) to another by requiring the 'doers' of injustice to restore their victims as fully as can be done to the position they would be in, had the injustice not been done. This principle of correction makes wrongdoers morally and legally accountable to victims; it responds to violations of bilateral relationships of right and duty between them; it

cases all concern money benefits, there is no logical or normative reason why duress cannot trigger a claim for services rendered.

¹⁷⁰ *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASC 36 [25] (McLure P).

¹⁷¹ *Barton v Armstrong* [1976] AC 104.

¹⁷² *Brenner v First Artists' Management* [1993] 2 VR 215; *Benedetti v Sawiris* [2013] 3 WLR 351.

¹⁷³ For an influential source, see Weinrib above, n 5. An further list includes: A Kronman 'Contract Law and Distributive Justice' (1980) 89 *Y LJ* 472; J Coleman *Risks and Wrongs* (CUP, 1992); 'The Practice of Corrective Justice' (1995) *Arizona LJ* 15; P Benson 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) *Iowa L.Rev* 515; R Wright 'Right, Justice and Tort Law' in D Owen (ed) *Philosophical Foundations of Tort Law* (Clarendon, 1997); 'Substantive Corrective Justice' (1992) 77 *Iowa L Rev* 625; L Smith 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas L.Rev* 2115; D Klimchuk 'Unjust Enrichment and Corrective Justice' in J Neyers et al (eds) *Understanding Unjust Enrichment* (Hart, 2004); 'On the Autonomy of Corrective Justice' (2003) 23 *OJLS* 49; J Gardner 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 *Law & Phil* 1.

ignores the past (or current) needs, resources and character of the respective parties, and it comprehends the purposes of monetary awards solely in terms of preserving and protecting private entitlements, not pursuing broader political, economic or social ends. This is not to say that dispensing corrective justice cannot have desirable distributive effects, or create incentives for perpetrators to change their behaviour, but these are beneficial side effects, not aims. From this point of view, private law is not a forward-looking system of social policing or regulation, but a backward-looking mechanism of reparation and resolution. Social security schemes that treat and make good the financial effects of injuries of the poor, or which compensate road or industrial accident victims from general taxpayer (or other ring-fenced) funds do not do corrective justice, they are simply worthy social and political responses to individual needs, designed to provide a conscientious level of assistance to the sick and the vulnerable. Payments under such schemes do not replicate prior 'entitlements' of the injured, but represent *divisional distributions* of social resources according to a different criterion (need, character, merit etc), in which political compromises between different groups, social priorities and available resources are constantly struck and changed. Such schemes follow the changing patterns of distributive, not corrective justice.

Not every aspect of private law doctrine reflects the norms of corrective justice. An institution's vicarious liability for an employee's wrongdoing is an exception on all but the most strained analyses. So the liability of the Catholic Church, ADF or Government for the injustices outlined above can only be understood in corrective justice terms where that liability is for a personal, organisational failing. Corrective justice nonetheless has a credible claim to underpin and explain many parts of the law of torts, equity and unjust enrichment law, including the substantial damages awards made in cases of negligence and trespass to the person, breach of fiduciary duty and restitutionary awards for unjust enrichment. Political interventions into the substance of the common law do not wholly derogate from this conclusion. The basic fabric of the common law system is institutionally independent and its conception of how to 'restore' victims is relatively stable, morally inspired and formally insulated from wider 'political' processes. These could indeed be seen to be some of its strengths.

Drawing on corrective justice and private law, we argue that awards under reparations schemes should be significantly higher, taking into account the full range of interests - physical, mental, emotional and economic - that courts protect. Existing financial caps in abuse cases need to be upwardly revised; account should be made for the period of time over which victims have been denied a remedy (through allowance for interest), the design of reparations schemes should take account of legal precedents in determining relevant monetary limits; and assessors should be bound to consider previous awards made under the relevant scheme in similar cases. Those implicated in injustice should not simply provide discretionary assistance such as counselling on an on-going basis, but rather victims should be given full control over their own future provision and care. Not only is the sentiment of *ex gratia* provision inappropriate, given the violations of personal rights that have taken place, but the norm pressing for reparation is more than a matter of discretion. It is one of duty and right. It is also highly anomalous from a corrective justice point of view that AFTRS excludes wages that were withheld beyond 1969. These are unjust gains made at the expense of victims that still remain to be corrected and restitution should be paid.

Reparations awards should also be more highly individuated, not banded in ways that vaguely approximate the value of 'average' injustices to 'average' categories of victims. This is a matter of respect for the individual right-duty relationships that have been violated. It is also an unacceptable feature in the design of a reparations system for gates to be closed and barred on claims at a particular date without making explicit provision for exceptions. Although the various *Limitation Acts* are certainly far from ideal, and have indeed been responsible for much technical

obstruction of private justice over the years, they do express a readiness to make such exceptions. Such exceptions are especially important in cases of abuse, where victims may simply not be psychologically able to meet the apparently arbitrary deadlines of bureaucracy. Whilst it is, therefore, understandable that DART should be designed in such a way as to try to provide financial certainty for Defence, an express acknowledgement that schemes will remain open to those who have good reason not to be able to meet their timelines would be more consistent with private law principles, as well as more obviously compassionate. One obvious lesson of the past is that these issues take a long time to work their way out. They cannot be dealt with overnight in a single blow. Reparations systems must be available longer-term.

The implications of corrective justice norms for evidential thresholds are less clear, indeed it is hard to derive any particular standard of proof from the proposition that injustices should be fully corrected. One of DART's most attractive features is the lower evidential standard of mere plausibility. It may be that the relatively low reparations payment caps to which we have referred represent a trade-off for this concession: less is paid, because less evidence is demanded. To our mind, this should not prevent victims who are able to establish abuse according to the normal civil standard from recovering significantly higher awards than those currently available, assuming they have suffered serious effects. In any case, it is not possible to determine whether the standard reached by claimants was in fact a higher standard, since decisions are not public. Another factor which cannot be ignored in DART, which is of relevance in determining the standard to be applied, is the setting in which complaints occur. One might argue there is a lower risk of unreliability (in the sense of false complaint) in such instances, because of the institutional framework and the risk that any complaint could end a victim's career.

B. Lessons about Institutional Integrity and Process

Private law is not just a system of corrective justice. It is, more generally, a system of law attended by features of institutional integrity including independence, transparency, mechanisms for treating like cases alike, and reviewability. Each of these features is powerfully legitimising. We suggest that these features should be more strongly incorporated into reparations schemes.

A commitment to independence is crucial. This is not simply a matter of 'private purity', but public appearance. However independent-minded and fair are the individuals determining claims in *Towards Healing* or the *Melbourne Response*, it is inappropriate for them to be appointed by institutions implicated in the relevant injustices. Formal independence does not just provide greater assurance of equity, but inspires public confidence and helps in the vindication of victims' claims. An independent adjudicator appointed by the State, such as a former judicial officer, may be a good solution. Funding for the post could also be state-provided, and, as long as the appointment itself is independent, corrective justice also mandates recovering the costs of the post from the institution accepting responsibility for the abuse. Formal independence of this sort has been identified as appropriate for the decision maker proposed in the Royal Commission Redress model.¹⁷⁴

Transparency requires that the processes of reasoning according to which reparations payments are determined, should be made visible through publication of awards (with due respect for protecting the identity of victims), provision of reasons for those awards, and by according proper attention to distinct heads of loss suffered by victims. This in itself should assist in producing greater consistency between equivalent cases, a matter that could also be improved by allowing assessors access to legal precedents.

¹⁷⁴ Consultation Paper, p171.

Finally, determinations should be subject to independent review, via some mechanism of appeal. This is desirable in itself even within a scheme in which the primary assessors are wholly independent, but its importance is made all the more obvious by *Towards Healing*, where the semblance of partiality is strong. We note that this possibility is also now foreshadowed in the Royal Commission Redress model.¹⁷⁵

Institutions providing reparations schemes might object to the suggestion that private law principles and norms of corrective justice should be used to bolster and inform their arrangements, arguing that their own legal responsibility for the events in question is not established. The wrongs, they might say, are the wrongs of particular individuals, not their own, so there is no reason why they should pay the same sums that wrongdoers would pay. Moreover, were private law to be used, they might escape responsibility on one of a number of technical or substantive grounds, so there must be at least some discount for this chance. A better analogy, they would argue, would be with the sort of lower payouts to be found in no-fault accident compensation schemes, or criminal injuries compensation.

We acknowledge this argument, but consider it to be flawed for two reasons. First, some of the institutions in question are quite clearly at fault, or have been unjustly enriched and would be subject to legal claims in the absence of limitation difficulties. The responsibilities they are meeting in this instance are genuinely their own. Second, whether or not legal liability could be established, all of the institutions in question have accepted institutional responsibility for the injustices perpetrated, by both apologising and entering into private reparations schemes with a commitment to doing 'justice'. Having undertaken to do so and to respond to an acknowledged wrong, institutions should, as stated above, more closely observe the remedial norms that corrective justice demands, not seek simply to deal with victims' most immediate needs, or bargain down the sums paid as if everything were a matter of *ex gratia* private discretion. There is therefore a critical distinction, in our view, between private reparations schemes that are created and funded by institutions *responsible*, or *accepting responsibility, for injustices*, which ought to more closely map some of the features of private law solutions, and taxpayer-funded schemes of social provision for victims. Appropriate models for schemes of the latter type might indeed be along the lines of existing criminal injuries compensation schemes, with lower payouts, designed to reflect government's difficult task in engaging in a distributive balancing exercise with limited public resources between a vast range of competing demands. But the schemes we have examined here are not of this type. They are schemes provided by those *responsible* for injustice not simply in a general social sense, but through their close connection to, and involvement in it. That is a very different matter. The appropriate starting point for dealing with such cases is the private law paradigm, not weaker distributive justice schemes of public welfare-provision. What we end up with may not *exactly* replicate private law solutions, but should certainly more closely approximate them than the schemes we currently have.

V. CONCLUSIONS.

The membrane between public, extra-legal and private law strategies for dealing with cases of grave historical injustice has hitherto been regarded as impermeable, in the sense that private law's technical defects have been regarded as disqualifying it from making any useful contribution to the design or operation of such schemes. Few useful messages have been allowed to pass from the private into the public domain. We argue that private law's doctrines and remedies in fact provide a rich normative resource upon which to draw in designing reparation

¹⁷⁵ Consultation Paper, p173.

schemes – centuries of learning, in fact, about the nature and meaning of some of our most basic rights and appropriate ways of dealing with their infringement. Our analysis provides practical suggestions as to the design of reparations schemes in order to implement justice for victims. This is, after all, what these reparations schemes purport to be about and if the rhetoric is to match the reality, then the meaning of ‘justice’, as the private law has historically conceived of it, cannot be ignored.