AUSTRALIA'S *EX GRATIA* REDRESS

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A crime is atoned for; a political liability is limited …
– Karl Jaspers[1]

Since 1997 there has been a series of official reports detailing Australia's history of persistent failures regarding the discharge of public obligations concerning children in care.[2] Drawing attention to the large numbers of children involved and assigning a significant degree of governmental responsibility for relevant wrongdoings, the reports recommend providing governmental redress for those injured.[3] In response, Tasmania, Western Australia ('WA') and Queensland introduced redress programs providing monetary payments *ex gratia* for the abuse of children who were in institutional care or (in some cases) who were otherwise 'wards of the State'.[4] In addition, Tasmania established a distinctive redress program of *ex gratia* payments acknowledging that State's involvement in the 'Stolen Generations'.[5] Attending to the content of these programs, this study considers the possibility that their *ex gratia* character is mismatched with the requirements for appropriate redress.

Black's Law Dictionary (2004) characterises the *ex gratia* instrument as follows: 'as a favour; not legally necessary'.[6] 'As a favour', state *ex gratia* disbursement criteria include that payment be benevolent, made in response to a loss or other burden, and that there be no clear legal liability for, nor prior right in the victim to, payment from the state.[7] The consequent discretionary character of these payments does not commit the state to an ongoing practice of treating like cases alike. An *ex gratia* payment responds to a particular case, not the generic claim. In the cases considered here, the justification for payment is the moral value of providing pecuniary alleviation to those burdened through no fault of their own. Thus an *ex gratia* provision is closely linked to norms of charity.[8] Like charity, an *ex gratia* payment responds to those burdened without regard to rights of relief and thus is doubly-removed from a traditional discharge of rectificatory liability, both in its explicit denial of liability to an originating claim right in the payee and its discretionary rejection of any other prior categorical source.[9]

The *ex gratia* characterisation of Australian State redress should be of particular interest to those concerned with relationships between the law and Australia's Indigenous communities. Legal professionals are intimately involved in all aspects of these programs; from their set-up and administration through to the legal counsel offered at the point of indemnity. In that the profession is shaping the participation of both States and Indigenous persons in processes of redress, the following analysis speaks to issues of significant legal concern. Further, although Tasmania's Stolen Generations program is the only program that makes Indigeneity a necessary condition of eligibility, Indigenous persons constitute a large number of claimants for 'abuse-in-care' redress payments – often around 50 per cent.[10] Hence there is a significant 'Indigenous interest' in the redressive qualities of the programs, particularly if they are understood as part of Australia's decolonisation and reconciliation processes. As aspects of these processes, it is of particular interest that only Tasmania's Stolen Generations program encompasses redress for those assimilative State policies that enabled the systematic wrongful removal of children from their families. In contrast, the three abuse-in-care programs restrict their ambit to wrongful events subsequent to removal. The paper returns to this point below. Finally, the abuse-in-care programs involve claimants trading-off potential legal rights to compensation in exchange for *ex gratia* payments and the study addresses some of what is at stake in these trade-offs.

Concerning linkages between redressive content and normative justification, this study's main finding is that, with the partial exception of Tasmania's Stolen Generations program, the *ex gratia* characterisation of state redress remains dubious whether one assesses these programs using either a corrective or a restorative framework. So far, these two frameworks are the most common normative conceptualisations for state redress; therefore, it is significant if neither can easily accommodate *ex gratia* payments.[11] In providing an assessment of Australia's existing *ex gratia* redress schemes for abuse in care, this paper also aims to inform the development of future redress schemes. The South Australian Government has indicated the possibility of introducing both a general abuse-in-care scheme[12] and a Stolen Generations-specific scheme.[13] At the federal level, a general abuse-in-care program has not been ruled out by the current Federal Government.[14] Furthermore, although the Federal Government has refused to establish a redress scheme for the Stolen Generations, the issue remains prominent among both community and governmental actors.[15]

I The Nature of the Study's Analysis

It has become increasingly common for states to respond to their wrongdoings by disbursing monies to classes of victims,[16] but there are few published normative analyses concerning *ex gratia* redress.[17] Consequently, this study is both preliminary and limited in scope. As the work assesses the character of State governments' public redressive responses, the analysis is restricted to publicly available material: it would be penumbral to inquire, for example, into the private motives of individual politicians. Restricting its analysis to state action, the study suggests but does not pursue other lines of historical, sociological and predictive analyses pertaining to those Australian States which have (and have not) provided redress. This study treats the States in the same way that many national and international practices (including the law) do: as moral *cum* legal actors liable to the claims these identities impose.[18] In the cases considered here, the States' actions have been judged wrongful. And the manner of State response is of significant interest.

State redress involves *performances* by states.[19] Any particular redressive act may require a number of necessary constitutive performances. To take a related example, a minimally successful act of apology acknowledges, takes responsibility for, and indicates remorse regarding both the commission and wrongfulness of an act.[20] One can imagine examples wherein what is touted as an apology fails as an apology because it lacks some number of necessary performance conditions.[21] Moreover, we can make mistakes – sometimes we understand someone to have presented an apology when in fact none has been offered. A failure to perform the necessary conditions of an act endangers the status of the act. In this vein, if Australia's redress programs contain unjustified departures from standard normative frameworks these departures may threaten their redressive status.

The following analysis of state redress performances requires at least two assumptions, both contestable. First, state redress is moral; 'making redress' entails an action with a moral quality or value.[22] In particular, successful redress achieves something with normative value; redress has a point. In support of this assumption, the study provides evidence that relevant actors understand state redress as a moral action drawing on both corrective and restorative justice registers. Second, successful acts of redress entail necessary performances. This is more problematic. 'Corrective justice' and 'restorative justice' offer at least two distinct rectificatory frameworks (one might think of constitutive rule-sets) for 'making redress'. Performances of redress in the respective frameworks are not necessarily the same thing. To use a familiar analogy, both chess and flirtation can be 'games' but this is not because they are differing species within a genus.[23] As such, not all redress is the same, in part because different types of redress have distinct normative purposes. Therefore, after briefly describing the programs in question, the study offers two separate critical discussions – the first based in corrective justice, the second in restorative justice – before concluding with a brief series of prescriptions.

II Australian Redress

In generic terms, given the significant costs and uncertainties involved in litigating historical child abuse cases, both Australian States and claimants may have good reason to prefer comprehensive redress schemes.[24] A State opens its claims program by disseminating eligibility and assessment criteria to potential claimants and other interested parties. In this material, the State characterises the nature of the redress payments; including, at least in the cases considered here, the stipulation that monies are provided *ex gratia*. Subsequently, applicants apply for payment, thereby beginning a process in which program criteria determine particular payment values. Finally, payments are made. State redress programs

involve and are accompanied by important non-pecuniary measures. These include apologies, memorials and deeper changes to historical understandings (expressed in, among other contexts, education curricula). The context of these non-pecuniary measures may shape participant understandings of the *ex gratia* payments. This contextual shaping may have particular relevance to restorative readings of redress payments as instruments of societal reconciliation.

Shifting from the generic to the specific, in this decade Tasmania has operated two *ex gratia* redress programs. The first program began to accept applications in 2003 and closed (for the third time) in June 2008.[25] Like the later Queensland and WA schemes, Tasmania's first program targeted residents of children's institutions who suffered physical, sexual or emotional abuse while in State care, including members of the Stolen Generations.[26] These three abuse-in-care programs ask applicants to specify details of abuses suffered and provide evidence of consequent harms.[27] Using that information, State assessors attempt to calibrate payment amounts to individual experiences of injury. In addition, these programs require claimants to indemnify the State against all current and future claims arising from the applicant's abuse in care. The schemes include funding for the provision of independent legal counsel to applicants prior to them indemnifying the State.

Queensland and WA differ from Tasmania's abuse-in-care program in having two 'levels' of payment. If an applicant can establish their present vitality and that they experienced the relevant wrongdoing to a requisite degree (a simple institutional presence may be sufficient), they will be eligible for a level payment. The second tier offers a chance to receive more money in exchange for substantiated evidence of severe injury. Evidence of severe injury both qualifies an applicant for a second-level payout and determines the value of that payment. In Queensland, applicants choose whether to apply in both tiers or simply to the first. In WA, an assessor streams applications into one of the levels.

Tasmania's Stolen Generations scheme is comparatively distinctive in terms of the class of people it applies to, its payment provisions and the wrongdoing to which it responds. In the *Stolen Generations of Aboriginal Children Act* (2006), Tasmania created a $5 million fund to provide *ex gratia* payments to wrongfully removed Indigenous persons and their immediate children.[28] The program is specific to Aboriginal persons and offers redress payments for acts of wrongful removal in a historical context of coercive cultural assimilation. The Tasmanian Stolen Generations program distinguishes two levels of payment on the basis of wrongful removal. Those wrongfully removed were eligible for the second tier ($58 333) while their children were eligible for only the first-level payments of $5000 (up to a maximum of $20 000 per family group). Accepting a total of 106 claims out of 151 applications, this scheme neither calibrated payouts to individual injuries nor required claimants to waive future legal claims.

Over the page, Figure 1 summarises scheme-specific information.[29]

III *Ex Gratia* Corrective Justice?

The *ex gratia* content of state redress creates a straightforward mismatch with corrective justice. In the conventional understanding, corrective justice recognises the rights of the injured to full compensation.[30] The corrective burden is not (as the *ex gratia* device entails) voluntarily assumed. Recall that e*x gratia* redress denies that those injured have pre-existing remedial rights. Payment is not made merely *without prejudice* to any rights-claim – it is a condition of making the *ex gratia* payment that the state does not consider itself liable.

The contradiction with corrective justice norms raises questions as to why Australian States are offering redress *ex gratia*.[31] Addressing this point, a 2004 Tasmanian report stated that the relevant suffering was 'not compensable' and the time elapsed since the wrongdoing meant that many 'abuse allegations could not be proved.'[32] The WA Government has suggested that an *ex gratia* redress scheme provides 'easier access to reparation … than is currently available via the courts'.[33] These arguments provoke a number of straightforward critical responses. Firstly, monetising non-compensable suffering is a civil and legal commonplace.[34] Second, States could act to facilitate litigation by, for example, waiving the statutory limitation defence. Third, as the study indicates above, many *ex gratia* programs do not dispense with the need for evidence quite similar to (though sometimes perhaps less onerous than) legal 'proofs'; therefore, such a dispensation is not a condition of being an *ex gratia* scheme. States set eligibility criteria that (particularly in the second level of the abuse-in-care programs) demand evidence from claimants that is analogous to evidence recognised by courts. Finally, the arguments States offer depend on arbitrary limits

Figure 1: Australian *Ex Gratia* Redress Schemes

	Tasmania[a]	Tasmania Stolen Generations	Queensland	Western Australia
Eligibility	Abused 'wards of the State'	Indigenous members of the Stolen Generations removed prior to 31/12/75, and their biological children	Abused (non-foster care) residents of children's institutions prior to 31/12/99	Abused residents of children's institutions prior to 1/3/06
Payments[b]	$60 000*	$5000 / $58 333	$7000 / $40 000*	$10 000* / $45 000*
Total funding[c]	$27.5 million	$5 million	$100 million	$114 million[d]
Indemnity?	Yes	No	Yes	Yes
Point of efficacy[e]	Indemnity	16/10/2006	Indemnity	Indemnity
Program dates:	11/07/03–30/6/08	15/1/07–15/7/07	1/10/07–30/9/08	1/5/08–30/4/09
Intra-program assistance	Legal counsel for indemnity, arms-length counselling	Arms-length counselling	Legal counsel for indemnity, financial advice, funding and referrals to arms-length support	Legal counsel for indemnity, financial advice, funding and referrals to arms-length support
Related initiatives[f]	Interview archive, individual letters, memorial, police referrals, parliamentary apology	Parliamentary apology	Commission of inquiry, Forde Report, apology, memorial artworks, reconciliatory experiences	Individual apologies, State Reconciliation Action Plan, police referrals, memorial, narrative archive

Values marked with an asterisk (*) are maximal. Of these, the Queensland figure is the maximal second tier disbursement added to the basic first level payout.

a In August 2008 Tasmania announced an open-ended program with a maximal payout of $35 000 for those who did not apply in time for the final June 2008 cut-off.

b Double entries in this row correspond to the schemes' differing 'two level' structures. The numbers are gross figures. Monies disbursed to applicants may differ.

c Except for Tasmania's $27.5 million, these numbers are 'caps'.

d Of this figure, $90.2 million is to be disbursed as individual payments.

e The 'point of efficacy' (sometimes called a 'cut-off date') is the moment at which a person must be alive in order to be eligible for the monies.

f Entries in this row are indicative and may not be exhaustive.

to options, since they ignore the alternative of comprehensive redress programs recognising rights to redress.[35]

In programs other than Tasmania's Stolen Generations scheme, receipt of payment requires applicants to indemnify the State; therefore, applicants must choose between an *ex gratia* process and the alternative of uncertain, expensive and personally costly civil litigation. Accordingly, both claimants and States may prefer comprehensive redress schemes to litigation. However, since corrective justice obliges offenders to make full compensation, it is worth exploring the ways these *ex gratia* programs offer cost-savings for both claimants and States.

For claimants, acquiring compensation from a redress scheme is quite likely to be less costly than litigation. The 2007 *Trevorrow* case indicates both the potential and the pitfalls of the legal alternative.[36] A member of the Stolen Generations, Bruce Trevorrow, received a judgment for $525 000 in damages against South Australia.[37] Yet Trevorrow stated 'I worry that my case could give people false hope' and argued that the physical and emotional stress of the nine-year case

damaged his health.[38] Eligible applicants for state redress will consider Trevorrow's compensation in the context both of his protracted struggle and his unique personal circumstances.[39] Compared with the drawbacks of litigation, the Australian redress schemes offer considerable advantages for those injured. The programs promise significant monetary relief in a non-adversarial and relatively speedy administrative context.[40] Consequently, claimants may choose *ex gratia* redress over litigation. However, these personal and pecuniary advantages do not derive from the payments' *ex gratia* characterisation; therefore, they do not, at least without further argument, support that characterisation.

For the States, an *ex gratia* approach directly reduces expectable payouts in three ways. First, it raises a barrier to posthumous claims. With some exceptions, pecuniary claims devolve to estates; therefore, if a posthumous claimant would have had a compensatory right against the State, their descendants' claim would be strengthened.[41] *Ex gratia* payments do not recognise pecuniary claims; therefore, an *ex gratia* characterisation helps preclude descendants from pursuing compensation. Second, (and for similar reasons) an *ex gratia* footing inhibits comparatively situated claimants from pursuing inclusion through the courts.[42] Finally, the *ex gratia* repudiation of corrective rights avoids a recognition that might otherwise support eligible applicants electing to pursue litigation. If these redress programs were to recognise corrective rights, that fact of recognition would be useful to both present and future plaintiffs.

For States, the *ex gratia* device appears to offer both direct expenditure reductions and, by containing the ambit of valid claims, greater predictability. Given this effect, it is interesting to place the *ex gratia* device into a broader cost-saving context for States, such as late 'efficacy dates'[43] and relatively low payout amounts.[44] With regard to the last point, Queensland's redress program has a $100 million cap. The program has received over 10 200 applications.[45] If the Tasmanian abuse-in-care program's acceptance rate of around 75 per cent (as of June 2006) is a rough guide,[46] Queensland will accept approximately 7650 applications. Using the $100 million figure, the consequent average of $13 072 per applicant is 2.5 per cent of the *Trevorrow* award ($525 000).[47] In terms of this comparison, WA is funding approximately $9020 per eligible applicant (1.7 per cent of the *Trevorrow* award).[48] The maximal figures of both Tasmanian programs are approximately 12 per cent of *Trevorrow*, but only in the Stolen Generations program do all receive $58 333. The average payout of Tasmania's abuse-in-care program has been $35 000 (6.6 per cent of the *Trevorrow* award).[49] Finally, it is likely that a significant number of victims in Queensland and WA will receive only the first-tier payout, respectively 1.3 per cent and 1.9 per cent (maximal) of the *Trevorrow* award.[50] These very rough comparisons do not account for the States' expenditure in administering the programs and the financial commitments associated with larger reconciliatory efforts. Neither do they include both the claimants' and the States' potential savings on court cases and related administrative costs.[51]

Corrective justice recognises remedial rights to full compensation. *Ex gratia* redress is a denial of liability associated with what may be less than full compensation. Since the relevant cost savings for claimants do not derive from the *ex gratia* nature of the redress programs, the *ex gratia* denial of right may constitute part of the States' resistance to paying full compensation. In support of this possibility, *ex gratia* redress offers both decreased payouts and the prospect of making the associated costs more predictable. Given the financial constraints on public finances, this may be justifiable. If so, the financial argument for the payments' *ex gratia* character should be readily publicly available.[52] In the absence of this argument, observers are left with an unexplained *prima facie* case that States are offering a defective form of redress. On the evidence, and given program requirements for indemnities, a corrective justice critique suggests that States are using the *ex gratia* denial of right in an effort to obtain legal peace. This effort has three interrelated features: (1) a recognition and response to injurious wrongdoing (2) in a manner that contains costs, but (3) does not provide further support to those interested in pursuing court settlements.

Regardless of state interest, in terms of corrective justice one does not grant favours as redress for wrongs committed; one is obligated. From a corrective justice perspective, *ex gratia* redress appears akin to a categorical error – like Pharaoh willing the Nile flood. But whatever attraction this straightforward criticism has, it is insufficiently nuanced. An analysis sensitive to the normative understandings of those involved will consider the possibility of understanding state redress in restorative justice terms.

IV Restoring State Redress?

With health and unity as key themes, restorative justice is both relational and therapeutic.[53] Generally, restorative justice comprehends those injured against a regulatory

'frame' of healthy communal relations, emphasising how injustice damages the capacities of victims, trapping members in destructive cycles that harm the whole community.[54] The purpose of restorative redress is to enable people to repair damage caused by injury. The process of repair involves opportunities for emotional healing and socioeconomic capacity-building: the explicitly forward-looking structure of restorative justice is often contrasted with the backwards-orientation of corrective justice.[55] Arguably, as an aspect of restorative redress an *ex gratia* payment need not have corrective content; rather, it therapeutically repositions the state–citizen connection 'to achieve better outcomes and to forge strong relations'.[56]

Restorative justice themes play a significant role in Australian redress. The WA Government argues that redress 'is primarily about the healing process and is designed to … help people move forward with their lives'.[57] State programs follow restorative lines in providing opportunities for therapeutic interaction. These include remembrance weeks, the recording of individuals' stories, counselling services, education and employment training. Redress documents stress the importance of these non-pecuniary redress spaces in community healing.[58] Therapeutic opportunities encourage participants to build capacities and work through relational deficiencies. In contrast to the corrective stress on *the terms* of a redress agreement, restorative justice emphasises *the process* of coming to, working within, and going on from, that agreement.

In a restorative approach, monetary payments assist the faultlessly burdened by significantly increasing the material resources available for ongoing development at both individual and community levels. But this is not their only restorative purpose. By recognising past failures, monetary redress payments play a role in expressing state sincerity. In terms of sincerity, individual payments fill an expressive gap in the depersonalised context of state redress. While the general structure of state redress builds on person-to-person redress conventions, differences between the capacities of states and individuals encourage practical divergences. State officials cannot in themselves embody the personal dispositions appropriate to redress (such as sincere contrition). This leaves a lacuna in state redress that is otherwise filled by the expressive aspects of conventional individual-to-individual redress. Officials can only act as state representatives; therefore monetary payments fill in part of the gap left by the displacement of redress onto a state-to-individual relation. The payments indicate the state's sincere willingness to disengage from conflict, offering those who identify as victims a reason to cease perceiving themselves as in conflict with the state.[59] The voluntary character of the *ex gratia* payments may appear to support this expression of state sincerity. Not bound by the courts to deliver through an adversarial process pitting the state (yet again) against its victims, the payments' discretionary quality expresses the sincere nature of the state's reconciliatory intent.

The previous section suggested that the *ex gratia* removal of redress payments from the realm of rights is part of a larger cost-containment strategy. However, in its prioritisation of healthy relationships, restorative justice resists this critical reading. As explicitly non-claim/non-legal right, an *ex gratia* characterisation facilitates direct communication between the state and claimants by encouraging applicants to engage with redress without the intermediation of an overseeing attorney.[60] The redress invitation is made in the hope that claimants accept the State's disbursement in the appropriate spirit, not of problematic compensation, but of reconciliation.

A restorative reading of *ex gratia* redress sees it as part of the state's attempt to shift the moral nature of the redress discourse. As the *ex gratia* device denies that the payments respond to rights, yet a redress characterisation nonetheless entails a normative purpose, the payments may be governed by a morality broader than the narrow band of corrective rights and duties. In contrast with 'backwards-looking' corrective justice, restorative justice is prospective, designed to help heal individuals and their communities.[61] In the grandest restorative vision, redress payments in the Australian context are part of an attempt both to respond to and create conditions of a larger shift in Australia's history. The redress programs may be a moment within an ongoing process of societal reconciliation. For the state, the program demonstrates its ethical character; evidencing its break with past errors.[62] For the 'victims', the acquisition of the payment becomes an empowering success.[63] In the face of an irreparable past, the *ex gratia* offer and its acceptance are mutual invitations to continue the reconciliation process.

A restorative understanding offers an important insight into the distinctive virtues of the Tasmanian scheme for Indigenous families affected by the policies underpinning the Stolen Generations. To begin, only Tasmania's Stolen Generations program specifically responds to wrongful child removals. While many eligible Queensland and WA

applicants are members of the Stolen Generations, the failure of these States to extend their programs to cover wrongful child removal may impair their appropriateness as redressive aspects of Australian reconciliation. In failing to make redress for their policies of unethical child removal in the service of forcible assimilation, these States exclude from their redressive recognition significant aspects of Australia's colonial history. By encompassing the wrongfulness of these removals, Tasmania's Stolen Generations program appears to be a superior restorative contribution to Australia's larger reconciliation projects involving Indigenous peoples.

With the exception of first-tier disbursements in Queensland (the significance of which are lessened by low values), Australia's abuse-in-care programs attempt to calibrate payment amounts to the information the State has regarding physical, sexual and emotional injuries inflicted in care. As a result, the provision and assessment of this evidence is a substantial aspect of the interaction of applicants with the redress programs. The focus on individual substantiated cases of physical, sexual and emotional abuse may de-emphasise the structural character of state wrongdoing. This emphasis shifts attention from systemically wrongful state policies (including policies of removal) to a concatenation of individuated wrongs that the benevolent state acts to alleviate *ex gratia*. In general, if the purpose is restorative redress, it is unclear why these States calibrate payments using the injurious basis of corrective claims. Further, since *ex gratia* payments do not respond to corrective rights, it is also unclear why applicants should renounce compensatory rights to receive restorative payments – indemnification situates the payments as in *lieu* of compensation. The States' restorative language may obscure the programs' reliance on corrective justice norms.[64] If so, these *ex gratia* redress programs confront a straightforward mismatch with corrective justice requirements.

In contrast, with regard to its specifically restorative character, because Tasmania's Stolen Generations program does not vary disbursements with regard to evidence of individual injury, this program is largely non-compensatory.[65] Moreover, as the payments are not compensation for damages, the program does not require indemnification and is therefore distinct from corrective justice practice in not displacing corrective rights. Disbursement values are above the average of other programs, with this relative largesse complementing restorative goals of economic capacity-building. Finally, by including the children of primary victims, the scheme recognises the relational and intergenerational impact of wrongful child removal and distributes economic resources in a manner that may strengthen communities. For these reasons, but subject to certain caveats raised below, Tasmania's Stolen Generations program is relatively more plausible as restorative redress.

A restorative perspective interprets redress payments as part of a long-term reconciliation process. But as a requirement for claimants to renounce all future rights-claims, indemnification sits uneasily in a restorative framework.[66] This problem is compounded by the *ex gratia* denial that there are rights to be addressed. The States' denial of liability and their demand for legal peace may not persuade people who understand their participation in redress programs (at least in part) in terms of rights. Instead, these programs may push applicants into an instrumental renunciation that is counterproductive on restorative grounds.[67] In foregrounding respect for rights, norms of corrective justice help ensure that reasonable conditions govern reconciliation processes. For these reasons, the failure to give corrective justice its appropriate due can encumber the healthy relationships restorative justice seeks to create.

Restorative justice may offer an appropriate framework for understanding *ex gratia* redress, if the payments merely assist faultlessly burdened members of the community. But those injured by systemically abusive childcare regimes have reasonable claims beyond mere needs-based assistance. Consequently, an assessment of the restorative adequacy of any State's *ex gratia* redress would need to consider that State's complementary performances in regard to associated reasonable claims. To expand, modern justice theory confronts the dominance of the state over its citizenry by circumscribing categorically protected realms, including claim rights.[68] At its most basic, respect for these obligations of justice is non-optional, with voluntary compliance differing sharply from the *ex gratia* characterisation of redress as discretionary and dependent on state benevolence. This dependent character provides a reason to think the flaws in *ex gratia* redress can be deeper than mere error if state redress programs fail to accord citizens a basic rule of law condition.[69] *Ex gratia* payments depend, like charity, on the payer's benevolence. In this way, the *ex gratia* provision of assistance can perpetuate an asymmetric power dynamic: the charitable benefactor and her beneficiary. In charity, 'the beneficiary is inferior to the benefactor',[70] and such asymmetries in power and status and the consequent structures of dependence associated

with charity are why charitable relations are penumbral to modern political theory. The implicit hierarchy of dependence appears particularly problematic when the alternative to *ex gratia* redress is legal confrontation with public authorities.[71] Simply put, on a restorative reading, an *ex gratia* response apparently fails to confront significant reasonable concerns.

V Conclusion

In general, this study argues that the performance of state redress can reasonably draw on either or both corrective and restorative justifications, but the Australian States' current usage of the *ex gratia* device in response to widespread wrongful child removal and systematic abusive childcare regimes is problematic on both accounts. The *ex gratia* character of the payment appears to be straightforwardly mismatched with the demands of corrective justice. The alternative suggestion, in which *ex gratia* redress has a restorative underpinning, appears most plausible with regard to Tasmania's Stolen Generations program. It is less plausible with regard to the three abuse-in-care programs as these fail to break sufficiently with corrective justice so as to establish an independent restorative approach. When considered against the individuated injury-based assessment and indemnities the other programs involve, Tasmania's Stolen Generations program has the comparative restorative virtues of being universal, non-compensatory, and more inclusive. That said, *ex gratia* payments are discretionary and depend on benevolence. As such, the problems with a redressive response of this nature oblige this study to leave open the question as to whether, when considered in the larger political-legal context, Tasmania's Stolen Generations redress is an appropriate restorative performance.

Because political redress is relatively novel and these four schemes are likely precursors to further redress programs, it is appropriate to conclude with prescriptive reflections, both political and academic. To take the latter first, the subject of *ex gratia* redress is largely uncharted; therefore my critical purpose has been to indicate roughly where certain shoals and skerries may lie. The study exposes a need for ongoing scholarship employing greater case-specific knowledge so as to integrate redress schemes into their unique socio-political contexts. Although the redress programs in Queensland, WA and Tasmania have many commonalities, each program is part of a unique constellation of State law, official and unofficial inquiries and reports, social mobilisations, and so on. This larger context, including non-pecuniary redress measures, may shape the function of *ex gratia* payments in ways unaddressed here. That said, there is a case requiring an answer. In this, *ex gratia* redress calls for deeper normative work, assessing individual programs on grounds of specific ethical theories with particular attention to gender and Indigeneity. In terms of this further work, researchers may wish to consider if this study's rubrics of assessment (in terms of restorative or corrective justice) are adequate to the phenomena. Considerations unique to State redress may create a distinctive space of normative justification.

In the absence of such a distinctive theory, *ex gratia* redress appears inherently problematic. As a consequence, public justification for this characterisation should be readily available. The particular concern of Indigenous peoples regarding the use of state redress in processes of decolonisation and reconciliation adds to the reasons Australian States have to act on the basis of reasons they publicly advance. That said, it may be naïve to expect complete transparency. In this vein, the study suggests certain practical prescriptions. If the drawbacks of litigation make a comprehensive and low-cost scheme preferable (for all participants), then a two-level scheme might confine *ex gratia* payments to a first tier defined by a low evidential threshold. If substantial evidence of injury is required, acceptance of that evidence as valid should ground liability. Similarly, redress agreements leaning on restorative understandings should follow Tasmania's Stolen Generations program in eschewing indemnification. Big issues in politics rarely admit peremptory finality and the history of State–Indigenous relations in Australia indicates that redress payments are unlikely to constitute a 'full and final settlement'. Hence, if state redress is restorative, Australian governments should consider facilitating injury-based corrective claims as an aspect of their multifaceted reconciliatory efforts. A denial of liability to these claims, matched against Australian histories of fiduciary abuse, leaves open the possibility of understanding *ex gratia* redress as a means by which 'reconciliation can operate as an instrument of colonial power'.[72]

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1 Karl Jaspers, *The Question of German Guilt* (E B Ashton trans, 2000 ed) 111 [trans of: *Die Schuldfrage*].

2 In addition to a number of State-level findings, the three main national reports are: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('*Bringing Them Home* Inquiry'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission (1997); Senate Community Affairs References Committee, Parliament of Australia, *Lost Innocents: Righting the Record – Report on Child Migration* (2001) <http://www.aph.gov.au/Senate/committee/clac_ctte/completed_inquiries/1999-02/child_migrat/report/index.htm> at 21 July 2009; Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (2004) <http://www.aph.gov.au/Senate/committee/clac_ctte/inst_care/report/report.pdf> at 21 July 2009.

3 The recommended forms of redress were neither exclusively nor necessarily monetary.

4 As a terminological point, I use 'state' to refer to the generic political institution and 'State' to refer to a particular federal Australian governmental body (eg, Tasmania).

5 The cases considered by this study are part of an increasing number of *ex gratia* redress programs. International examples include the Austrian General Settlement Fund (2001), the German Foundation for Remembrance Responsibility and Future (1999), the German Ghetto Labour Compensation (2007), redress of British chemical weapons testing (Porton Downs) (2008), Canadian chemical weapons testing (2004), Canadian Chinese Head Tax Redress (2006) Canadian Japanese Wartime Internment (1988), and Newfoundland and Labrador's pay equity program (2006). Domestic examples include the New South Wales Aboriginal Trust Fund Repayment Scheme (2004) and at least some of the payments made in Queensland's Indigenous Saving and Wages Reparations (2002). For a useful discussion of Australia's wage repayment funds, see Robin Banks, 'Stolen Wages: Settling the Debt', (2008) 12(SE) *Australian Indigenous Law Review* 55.

6 The 1891 entry is better written: 'Out of grace; as a matter of grace, favor, or indulgence; gratuitous. A term applied to anything accorded as a favor; as distinguished from that which may be demanded *ex debito*, as a matter of right'. Henry Campbell Black, *A Dictionary of Law* (first published 1891, 1991 ed) 444.

7 Sydney Centre for International Law, *Submission to the Inquiry into the Stolen Generation Compensation Bill* (2008) <http://www.aph.gov.au/Senate/committee/legcon_ctte/stolen_generation_compenation/submissions/sub57.pdf> at 21 July 2009; Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000) 207–9; *Financial Administration and Audit Act 1985* (WA), s 58B (now repealed).

8 For an explicit connection, see Peter Singer, *Practical Ethics* (2nd ed, 1993) 255.

9 In certain circumstances, *an agreement to pay* an amount *ex gratia* may create rights of receipt. *Edwards v Skyways Ltd* [1964] 1 WLR 349.

10 As of June 2008, 53 per cent of the 6655 applicants to the Queensland scheme identified as Indigenous: see Queensland, Parliamentary Debates, Legislative Assembly, 18 July 2008, 59 (Lindsay Nelson-Carr). In WA, 40 per cent of the 619 applications received by 11 November 2008 were from Indigenous persons. WA Department of Communities, *Submission to the Senate Community Affairs Committee Inquiry into the Progress Made with the Implementation of the Recommendations Into: The Child Migrant Inquiry Report,* Lost Innocents: Righting the Record*; the 2004 Report,* Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children*; the 2005* Protecting Vulnerable Children: A National Challenge Report (2008) 7 <http://www.aph.gov.au/senate/Committee/clac_ctte/recs_lost_innocents_forgotten_aust_rpts/submissions/sub12.pdf> at 10 January 2009. This report was prepared by Marilyn Rock.

11 This is not to say that redress must be either one or the other. Perhaps state redress need be neither: indeed this is a tentative concluding suggestion.

12 In accordance with a recommendation from the 2008 South Australian 'Mullighan Inquiry' into child abuse in State care, the South Australian Government has established a taskforce to 'closely examine redress schemes for victims of child sexual abuse and to investigate the possibilities of a national approach to the provision of services.' South Australian Government, *Implementation Statement by the Minister for Families and Communities to the Children in State Care Commission of Inquiry Report* (2008) 55.

13 Mike Rann, 'Bruce Trevorrow Will Get Full Compensation' (Press Release, 2 August 2007) <http://www.ministers.sa.gov.au/news.php?id=1963> at 21 July 2009. But see also Mike Rann, 'Findings to be Tested in Trevorrow Appeal' (Press Release, 28 February 2008) <http://www.ministers.sa.gov.au/news.php?id=2838> at 21 July 2009.

14 Senator Chris Evans advised on 16 June 2008 that, in relation to the Government's response to the 2004 Senate report

Forgotten Australians, which had recommended a national compensation scheme be established for people abused while in government care, 'no decision has yet been made … but we are … talking through what an appropriate response would be.' Commonwealth, *Parliamentary Debates*, Senate, 16 June 2008, 2135 (Chris Evans).

15 The Greens' Stolen Generations Reparations Bill 2009 (Cth), developed by the Public Interest Advocacy Centre ('PIAC') and the Australian Human Rights Centre, was introduced into the Senate on 24 September 2008 but is yet to be debated. See PIAC, 'Reparations Tribunal Crucial to Stolen Generations Reparation Bill' (Press Release, 24 September 2008) <http://www.piac.asn.au/news/media/20080924_rtctsgrb.html> at 21 July 2009.

16 For examples see Pablo De Greiff (ed), *The Handbook of Reparations* (2006), pt 1; Eric A Posner and Adrian Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 *Columbia Law Review* 689, 696–7.

17 Exceptions being, Law Commission of Canada, above n 7; Raymond Bradley, *The Lourdes Hospital Redress Scheme – A Flawed Scheme?* (2007) Malcomson Law <http://www.mlaw.ie/news/the-lourdes-hospital-redress-scheme-a-flawed-scheme> at 21 July 2009.

18 Because redress practice sits at this intersection of morality and legality, the paper does not differentiate between moral and legal realms of rectificatory liability. Helpful suggestions in terms of this relationship are found in Stephen R Perry, 'Responsibility for Outcomes, Risk, and the Law of Torts' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (2001) 72; Jules Coleman, 'Tort Law and Tort Theory: Preliminary Reflections on Method' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (2001) 183; and Arthur Ripstein and Benjamin C Zipursky, 'Corrective Justice in an Age of Mass Torts' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (2001) 214.

19 The performance conditions with which this study is concerned appear similar to Searle's understanding of illocutionary acts, saving that with regard to redress, the performances necessary to complete the act need not be those of language. John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (1969) 54ff.

20 Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991) 22–3. These are minimal requirements for the offender. Tavuchis's work details a number of further related and important phenomena.

21 For example, Fleming's argument that George Bush's July 2003 Goree Island statement was not an apology for slavery as it did not accept national responsibility. Eleanor Bright Fleming, 'When Sorry Is Enough: The Possibility of a National Apology for Slavery' in Mark Gibney et al (eds), *The Age of Apology: Facing Up to the Past* (2008) 95, 105.

22 This is not to say that state redress does not have other explanations or justifications. For example, the programs might owe their origins and content to the aims of striking a compromise between different sections of an electorate. This study's analysis does not deny the importance of these sorts of 'external' explanations. It merely has a different subject matter; what States are doing in terms of their redress programs. And (it might be added) it is essential to those other explanations of compromise etc, that in making redress States are attempting to engage with claimants morally.

23 Cf Ludwig Wittgenstein, *Philosophical Investigations* (trans G E M Anscombe, 1978 ed) 31–6 [trans of: *Philosophische Untersuchungen*].

24 For discussion of legal difficulties see Andrea Durbach, '"The Cost of a Wounded Society": Reparations and the Illusion of Reconciliation' (2008) 12(1) *Australian Indigenous Law Review* 22; Angela Sdrinis, 'Legal Barriers to Suing for Institutional Abuse', Appendix 1 in Broken Rights, *Submission to the Senate Inquiry into the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports* (2008) <http://www.aph.gov.au/senate/committee/clac_ctte/recs_lost_innocents_forgotten_aust_rpts/submissions/sub14.pdf> at 21 July 2009; Alliance for Forgotten Australians, *Alliance for Forgotten Australians (AFA) Submission to Senate Community Affairs References Committee Inquiry into the Implementation of the Recommendations of the* Lost Innocents *and* Forgotten Australians *Reports* (2008) 6–8 <http://www.aph.gov.au/senate/committee/clac_ctte/recs_lost_innocents_forgotten_aust_rpts/submissions/sub10.pdf> at 21 July 2009.

25 As of November 2008, the Minister responsible, Lin Thorp, indicated the program had accepted 686 claims with a further 1000 applications under consideration. Note that Tasmania has announced a successor to this program with a maximal payout of $35 000 for those who did not apply in time for the final June 2008 cut-off. Lin Thorp, 'Memorial to the "Forgotten Australians"', (Press Release, 26 November 2008) < http://www.media.tas.gov.au/print.php?id=25387> at 21 July 2009.

26 Ombudsman Tasmania, *Listen to the Children: Review of Claims of Abuse from Adults in State Care as Children* (2004) 9–10 <http://www.ombudsman.tas.gov.au/publications> at 21 July 2009.

27 Subsequent program-specific information in this paragraph and the next can be found in: Queensland, *Redress Scheme Application Guidelines* (2008) <http://www.communities.qld.gov.au/community/redress-scheme/documents/redress-application-guidelines.pdf> at 21 July 2009; Redress WA, *Redress WA Guidelines* (2008) <http://www.redress.wa.gov.

au/docs/REDRESS%20WA%20GUIDELINES.pdf> at 21 July 2009; Tasmanian Department of Health and Human Services, *Information for Applicants* (2008) <http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/31670/HCORP9026-05_Abuse_Booklet_P5.pdf > at 21 July 2009.

28 Information in this paragraph is drawn from Office of the Stolen Generations Assessor, *Report of the Stolen Generations Assessor*, Tasmanian Department of Premier and Cabinet (2008) <http://www.dpac.tas.gov.au/__data/assets/pdf_file/0004/53770/Stolen_Generations_Assessor_final_report.pdf > at 21 July 2009.

29 In addition to January and April 2008 conversations the author had with fund officials, sources for this data are: ABC Radio National, 'Tas Govt Offers Abuse Payout With Legal Waiver', *PM*, 6 December 2004 <http://www.abc.net.au/pm/content/2004/s1259077.htm > at 21 July 2009; Ombudsman Tasmania, *Listen to the Children*, above n 26; Ombudsman Tasmania, *Final Statistical Report: Review of Claims of Abuse from Adults in State Care as Children - Phase 2* (2006) <http://www.ombudsman.tas.gov.au/publications> at 21 July 2009; Paul Lennon, 'Abused Former State Wards' (Press Release, 24 January 2008) <http://www.clan.org.au/news_details.php?newsID=100> at 21 July 2009; Office of the Stolen Generations Assessor, above n 28; Queensland, *Redress Scheme Application Guidelines*, above n 27; Queensland Government, *Apology to Those Harmed in Queensland Institutions During Their Childhood* (1999) <http://www.communities.qld.gov.au/community/redress-scheme/forde-inquiry.html> at 21 July 2009; Queensland Department of Communities, *Update Report on Queensland Initiatives and Implementation of the Recommendations of the* Lost Innocents *and* Forgotten Australians *Reports* (2008) <http://www.aph.gov.au/senate/committee/clac_ctte/recs_lost_innocents_forgotten_aust_rpts/submissions/sub15.pdf> at 21 July 2009; Redress WA, *Frequently Asked Questions* (2008) <http://www.redress.wa.gov.au/faq.asp> at 21 July 2009; Redress WA, *Redress WA Guidelines*, above n 27. As the article went to print, the WA Government announced that the maximum payout available under the Redress WA scheme was to be reduced from $80 000 to $45 000. In an effort to provide the most recent information, we updated the information in the paper, but clearly this is a shifting policy area. Robyn McSweeney, 'Minister Gives Update on Redress WA Ex-Gratia Payments' (Press Release, 28 July 2009 <http://www.mediastatements.wa.gov.au/Pages/Results.aspx?ItemID=132268> at 12 August 2009.

30 For example, the van Boven/Bassiouni principles (the current international standard) include the right to proportionate compensation among the rights of remedy. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, 64th plen mtg, UN Doc A/RES/60/147 (2005).

31 I have been unable to find a public statement by Queensland addressing this question.

32 Quotation from the non-paginated 'Foreword' in Ombudsman Tasmania, *Listen to the Children*, above n 26. The point was echoed in the recent Senate Inquiry into the Stolen Generation Compensation Bill 2008. The inquiry's report adopted the language of the submission by the Sydney Centre for International Law (see above n 7) in stating that an *ex gratia* instrument was a 'convenient device for circumventing the evidentiary and legal difficulties'. Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Stolen Generation Compensation Bill 2008* (2008) 25 <http://www.aph.gov.au/Senate/committee/legcon_ctte/stolen_generation_compenation/report/index.htm> at 21 July 2009.

33 Redress WA, *Frequently Asked Questions*, above n 29. See also a similar argument in WA Department of Communities, above n 10.

34 See the section on *ex gratia* payments in *Bringing Them Home* Inquiry, above n 2, pt 4.

35 An example is Canada's Indian Residential Schools Settlement Agreement (2006).

36 For discussions of legal difficulties see also Durbach, above n 24; and Sdrinis, above n 24.

37 The sum comprises $450 000 in compensatory damages and $75 000 in exemplary damages.

38 Bruce Trevorrow, quoted in Kristie Parker, 'Bruce Trevorrow Waited Half a Century for Justice', *The Guardian* (online), 5 September 2007 <http://www.cpa.org.au/garchve07/1335koori.html> at 21 July 2009. Key elements in *Trevorrow*, particularly the documentation of harm caused by the state, will be difficult for other claimants to provide. A further hurdle concerns statutory limitations both in tort and in equity (*laches*). The *Trevorrow* Court denied these defences on the grounds that Trevorrow was 'grossly disadvantaged by depression and ill health. His resources, mental, physical and material, are limited': *Trevorrow v South Australia (No 5)* [2007] SASC 285, [939] (Gray J). This argument will not be universally attractive or available. Although providing the compensation monies *ex gratia,* South Australia has appealed the *Trevorrow* judgment. Trevorrow died in June 2008 with the appeal pending.

39 The difficulties of making this decision are illustrated in a news article concerning the potential applicant Glenys Collard. Victoria Laurie, 'Pay the Debt: Stolen Generations Need Help', *The Australian* (online), 7 March 2008 <http://www.theaustralian.news.com.au/story/0,25197,23331706-5013172,00.html> at 21 July 2009.

40 While this study is largely critical, it is important to note the positive reception the programs have received. The Queensland Redress Scheme's website includes four selected positive testimonials. See Queensland Department of Communities, *Testimonials* <http://www.communities.qld.gov.au/community/redress-scheme/testimonials.html> at 21 July 2009.

41 Strengthened, but not certain. For discussion see Stephen Winter, 'The Stakes of Inclusion: Chinese Canadian Head Tax Redress' (2008) 41(1) *Canadian Journal of Political Science* 121, 126ff.

42 As an example of a comparative claim, the American *Civil Liberties Act of 1988*, Pub L No 100-383, 102 Stat 904 (1988) gave a legal claim to interned Japanese Americans, but not to interned aliens. Interned Japanese South Americans challenged this exclusion (*Mochizuki v USA*, 43 Fed Cl 97 (1999)) and won a partial settlement – this campaign continues.

43 Most redress programs require a claimant to be alive as of an 'efficacy date' and few programs (the German Foundation Law is one) set that date at the beginning of the negotiation period. Usually, this efficacy date is near the beginning of the claims procedure; in the second Tasmanian program it is 16 October 2006. The other Australian redress programs set it at the point of indemnification. Such a late date creates a significant moral phenomenon. While all the programs prioritise applications from the elderly and infirm, it is very likely that some claimants will not receive redress (nor will their heirs) because they will die during the application process. WA's guidelines specifically exclude such claims from eligibility.

44 In WA, the relatively low monetary provision has prompted a class action challenge by Lavan Legal and WA Aboriginal Legal Service. However, it may be that few claimants can provide the necessary evidence for a viable court challenge. Victoria Laurie, 'Lavan Regrets Delays to Indigenous Claims,' *The Australian* (online), 8 August 2008 <http://www.theaustralian.news.com.au/story/0,25197,24144424-17044,00.html> at 21 July 2009.

45 Figure from Queensland Department of Communities, *Update Report*, above n 29, 4. This is 4200 more than the 6000 applications originally expected. Explanatory Statement, Social Security Exempt Lump Sum (Queensland Government Redress Scheme) (DEWR) Determination 2007, 2 <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/2CC51306DB9BE61FCA25735A000757C5/$file/DRedressSchemeExemptLumpSumESfinalExpanatoryStatement.pdf> at 21 July 2009.

46 Seventy-five per cent is a rough number; the actual acceptance rate at this point in the program was 76.3 per cent (670 of 878 applications). It is unknown what proportion will be accepted in Tasmania's re-opened scheme of the 1000 applications pending as of November 2008. In terms of comparison, a similar Irish program paid compensation to 95.3 per cent of its applicants and Tasmania's Stolen Generations program assessed 70.2 per cent of applicants as eligible. It may be that acceptance rates will vary widely across States. See Ombudsman Tasmania, *Final Statistical Report*, above n 29, 1; Sean O'Leary (Chair), *Annual Report of the Residential Institutions Redress Board* (2007) 60 <http://www.rirb.ie/annualReport.asp> at 21 July 2009; Office of the Stolen Generations Assessor, above n 28, 13.

47 This comparison assumes that Trevorrow's experiences are within norms of child abuse victims. Although the comparison's aptitude is open to challenge, Enda O'Callaghan argues the *Trevorrow* award is similar to the top payout amount in the comparative Irish program. Edna O'Callaghan, 'Models of Compensation: Ireland – The Compensatory Advisory Committee, the Commission to Inquire into Child Abuse and the Residential Institutions Redress Board' (Paper presented at the New South Wales Community Legal Centres State Conference, Sydney, 9 April 2008) 9. As of June 2008, the top payout in this Irish program was €300 500 and the average payout was €65 376. O'Leary, above n 46, 60.

48 Assuming a 75 per cent eligibility rate amongst WA's 'more than' 10 000 applications and using the $90.2 million figure indicated by the Minister on 28 July 2009. McSweeney, 'Minister Gives Update on Redress WA', above n 29.

49 The figure of $35 000 is quoted in Thorp, above n 25.

50 In terms of the *Trevorrow* award, the maximum payable ($45 000) in the WA scheme is about 9 per cent; the comparative number in Queensland ($40 000) is 8 per cent.

51 For an indicative discussion of litigation costs see Senate Legal and Constitutional References Committee, Parliament of Australia, *Healing: A Legacy of Generations* (2000) ch 8, 233–4 <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/stolen/report/contents.htm> at 21 July 2009.

52 This would contribute to creating a broader public debate wherein participants could pursue the suggestion that the immediate financial implications be mitigated through the payments of pensions along the lines of certain post-Holocaust programs in Germany. This possibility is raised by C Waite *Submissions on Forgotten Australians* (2008) <http://www.aph.gov.au/Senate/committee/clac_ctte/recs_lost_innocents_forgotten_aust_rpts/submissions/sub01.pdf> at 21 July 2009.

53 John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 11–12; Michael Humphrey, 'Reconciliation and the Therapeutic State' (2005) 26(3) *Journal of Intercultural Studies* 203, 203–4.

54 For an illustrative example, see argument in Philippa White and Debra Rosser, *Inquiry into Children in Institutional Care: Comments on Implementation* (2008) Christian Brothers Ex-

Residents and Students Consultancy, 6, 46 <http://www.aph.gov.au/Senate/committee/clac_ctte/recs_lost_innocents_forgotten_aust_rpts/submissions/sub03.pdf> at 21 Jul7 2009.

55 A discussion of corrective justice's forward-looking aspects is beyond this study. For suggestions see: Christopher Kutz, 'Justice in Reparations: The Cost of Memory and the Value of Talk' (2004) 32(3) *Philosophy & Public Affairs* 277; Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72(5) *Fordham Law Review* 101.

56 David Bartlett, 'Stolen Generations Assessments Completed' (Press Release, 22 January 2008) <http://www.premier.tas.gov.au/media/release.html?id=22896> at 15 February 2008.

57 WA Department of Communities, above n 10, 3. Note that with regard to Tasmania's abuse-in-care program, '[t]he [Tasmanian] Government decided to offer the *ex gratia* payment as part of the healing process.' Quoted from the non-paginated 'Foreword' in Ombudsman Tasmania, *Listen to the Children* above n 26.

58 Cf WA Department of Communities, above n 10, 8.

59 It may be that a coexistence perspective on state redress is particularly useful. Redress programs are often accompanied by supporting initiatives similar to those of coexistence practice. Overlaps include economic development, social services, and counselling/trauma management. For an overview of coexistence practices see Aneelah Afzali and Laura Colleton, 'Constructing Coexistence: A Survey of Coexistence Projects in Areas of Ethnic Conflict' in Antonia Chayes and Martha Minow (eds), *Imagine Coexistence: Restoring Humanity After Violent Ethnic Conflict* (2003) 3.

60 All three programs offer provision for legal counsel, after the initial application and the State's response.

61 See the discussion in WA Department of Communities above n 10, 8.

62 Robert Sparrow, 'History and Collective Responsibility' (2000) 78(3) *Australasian Journal of Philosophy* 346, 353. See also Pablo De Grieff, 'The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted' in Mark Gibney et al (eds), *The Age of Apology: Facing up to the Past* (2008) 120.

63 For example, Japanese Canadians suggest that achieving redress (in 1988) from Canada for their wartime internment both expressed and embodied the emergent power of their Canadian identity. Pilar Cuder-Domínguez, 'Surviving History: Kerri Sakamoto Interviewed by Pilar Cuder-Domínguez' (2006) 41(3) *The Journal of Commonwealth Literature* 137.

64 In some cases, calibrating payments on the grounds of injury might be a reasonable proxy for (or as a means of improving) restorative justice efforts. However, in the abuse-in-care programs there is superior evidence for a more fundamental corrective justice conception. For example, in personal correspondence Steven Bradford, Acting Executive Director of Redress WA, indicates the WA scheme adopts a 'tort model' of assessment based on the 'degree of harm suffered'. It is improbable that governments adopt a 'tort model' without regard to the rights conventionally implicated, particularly since WA stipulates that there must 'be a causal nexus between the alleged abuse/neglect experienced by the applicant and the care being provided by the State.' Redress WA, *Redress WA Guidelines*, above n 27, s 5(1)(a). This is a version of the 'proximate cause' rule of the common law which is generally held to establish liability (claim rights) regarding wrongful damage in terms of corrective justice. That said, a determined restorative justice theorist may believe the test helps determine the best restorative response, but at this point the argument appears strained. I thank both Glen Pettigrove and Omar Khan for independently pressing me to clarify this point.

65 The difference in the payment amounts accorded to residents and their children may have a compensatory basis.

66 Note the Queensland Government's statement that: 'The Redress Scheme completes the Queensland Government's response to the recommendations of the Forde Inquiry'. Queensland Department of Communities, *About the Redress Scheme* <http://www.communities.qld.gov.au/community/redress-scheme/about-scheme.html> at 21 July 2009.

67 See again the story of Glenys Collard in Laurie, above n 39.

68 Conceptualising this point in terms of rights suits current jurisprudence, but the point could be presented without rights-talk.

69 See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997) 52ff. The study cites Pettit as his discussion is sustained, but the concern with dependence is central to all Kantian ethical theory.

70 Aristotle, *The Nichomachean Ethics* (J A K Thomson and Hugh Tredennick trans, 1976 ed) 156–7 [trans of: *Ta Ethika*]. For application to Australian redress see Angela Sdrinis and Ryan Carlisle Thomas, *Why an Apology Is Not Enough* (2008) 6 <http://www.aph.gov.au/senate/committee/clac_ctte/recs_lost_innocents_forgotten_aust_rpts/submissions/sub18.pdf> at 21 July 2009.

71 Considered in context, the ageing and relatively disadvantaged class of claimants strengthens the argument.

72 Paul Muldoon, 'Reconciliation and Political Legitimacy: The Old Australia and the New South Africa' (2003) 49(2) *Australian Journal of Politics and History* 182, 187.