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

Simone Degeling (UNSW Australia) and Kit Barker (UQ)*

Abstract

This article reclaims an important role for the common law in cases of grave historical injustice. As we conceive it, 'grave historical injustice' consists in serious, widespread instances of wrongdoing which, for institutional, social, political or other reasons, has 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. There are many other examples across societies and nations.

Contemporary discourse assumes that private law has little or nothing to contribute to the debate about how to deal with such cases, on account of the expense and delay involved in litigation and technical obstructions internal to private law's own doctrines. It focuses instead on extra-legal political and administrative measures such as apologies, public inquiries, and limited reparation schemes, on the basis that these offer victims of injustice a quicker, more satisfactory solution. Here, we reclaim an important role for private law and its underlying normative framework of corrective justice 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

This article reintroduces the role of the common law in cases of grave historical injustice. As we conceive it, 'grave historical injustice' consists in serious and widespread instances of wrongdoing which, whether by virtue of institutional, social, political or other factors, has remained unaddressed and un-redressed by the law for long periods of time. Prominent examples with contemporary significance in Australia involve the Stolen Generations,[1] stolen wages, clergy abuse, forced adoptions,[2] abuse of members of the Australian Defence Force and forced child migration.[3] There are many other tragic examples common to societies and nations. Not only are such events disturbingly pervasive, they are buried deep in time. It is difficult enough to know how effectively to prevent their recurrence, but harder still, perhaps, to know how to set about repairing them. The future is open, but our past is closed.

---

*We are grateful for the generosity of Marily Hoey, Sarah Bassiuoni and Noel de Bien in locating sources.

[1] National Apology to the Stolen Generations delivered on 13 February 2008 by the Prime Minister Kevin Rudd.
[2] National Apology for Forced Adoptions delivered on 21 March 2013 by the Prime Minister Julia Gillard who apologised on behalf of the Australian Government to people affected by forced adoption or removal policies and practices. See http://www.ag.gov.au/About/ForcedAdoptionsApology/Pages/default.aspx (accessed 30 June 2014); Hansard 21 March 2013 page 2974, Speaker The Hon Mark Dreyfus MP (Attorney General), referring to the "…apology given earlier today by the Prime Minister".
[3] Apology on Child Migrants made on 24 February 2010 to the House of Commons by the Prime Minister the Hon Gordon Brown MP. Some evidence of abuses later suffered by child migrants has been heard by the *Commonwealth Royal Commission (Royal Commission) into Institutional Responses to Child Sexual Abuse* established on 11 January 2013.

Contemporary political discourse focusing on such events in western societies in the early 21st Century has been characterised by publicly apologising to victims. In some instances, these apologies have been followed or accompanied by extra-legal, political or administrative measures such as public inquires or reparation schemes. Monetary pay-outs under these schemes tend to be capped or awarded *ex-gratia* and the schemes as a whole are configured without reference to the legal remedies which victims might have under common law and equitable doctrines. If private law is not exactly ignored in these solutions, it is at least firmly set on one side, it being thought that litigation is simply too expensive to contemplate and too heavily obstructed by technical and evidential hurdles to offer victims a realistic solution. It must be conceded that in many instances victims who sue via private law claims have failed for exactly these reasons.[4] In attempting to by-pass these limitations, extra-legal solutions replicate the *language* of private law in so far as they claim to 'repair' or 'set right' wrongs done or enrichments unjustly obtained. However, their conception of 'restoration' is weak by comparison to private law analogues: too weak, in our view, to be acceptable.

Our analysis reclaims an important role for private law in informing and improving current extra-legal solutions. Private law has a unique infrastructural apparatus and particular normative approach to remedying injustice, which endorses a powerful conception of reparation. This conception draws its strength, at least in part, from ancient norms of corrective justice[5] and it expresses clear commitments to the values of independence, transparency, consistency, accountability and reviewability in dealing with victims' claims. We accept that apologies are an important and necessary first step, but argue that closer attention to private law's ethical commitments and remedial solutions can assist in re-invigorating and improving the form and detail of extra-legal schemes. In making this suggestion, we posit a significant role for corrective justice and rights discourse as a counterpoint to weaker distributive justice approaches in dealing with serious and widespread social harms, when the trend of much legal thinking in the late 20th and early 21st centuries has been in precisely the reverse direction, at least as regards accidental injury.[6] We fully accept that such distributive justice models of compensation have been beneficial in efficiently lowering legal costs and meeting the basic needs of accident victims.[7] However, our key observation is that in the cases of historic injustice we address, the relevant reparations schemes are designed, operated and funded by the very institutions, the government and Catholic Church, that are implicated in and have accepted responsibility for the wrongs that have occurred. Distributive models of justice are less appropriate, we suggest, as institutional responses to injustices committed or sanctioned by the 'repairing' institutions themselves. Distributive models are particularly inappropriate where those 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 by the institutions in question. We suggest that a better understanding of the type of repair required in such cases can be gleaned from the norms and remedies of private law.

---

[4] For example, the failure of the claim by the victim of abuse in *Trustees of the RCC v Ellis* (2007) 70 NSWLR 565.

[5] The origins lie with Aristotle, *Nicomachean Ethics*, Book 5, Ch 4, though much has clearly been written since then. For perhaps the most sustained and influential account of private law as an instantiation of corrective justice see the voluminous work of E. Weinrib, including: *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] 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), H Luntz 'Reform of the Law of Negligence: Wrong Questions-Wrong Answers' (2002) 25 *UNSWLJ* 836.

[7] For example, the New Zealand Accident Compensation Scheme.

We must stress from the very outset that it is not our primary intention 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 the private law system to improve its effectiveness and reach. Rather, we invite a deeper and more meaningful engagement between current reparations measures and the normative and doctrinal lessons that private law offers. In our view, the permeability of the membrane between legal and extra-legal solutions needs to be increased, so as to allow learning to flow constructively in both directions. Just as private law has lessons to learn from extra-legal solutions about speed, affordability and accessibility, so too, we suggest, existing extra-legal solutions can constructively draw on private law's understanding of what *justly* correcting past wrongs might mean. Where such schemes seek to define the obligations of institutions which *are responsible*, or *accept responsibility for injustices,* they ought therefore to more closely map some of the features of private law solutions.

Parts II and III explore several extra-legal schemes that respond to two paradigmatic types of historic injustice, setting them alongside the remedial possibilities offered by private law doctrines and remedies. Part II considers current administrative responses to well-documented cases of institutionalised abuse, both within the Australian Defence Force ('ADF') and the Catholic Church in Australia. Part III considers the New South Wales scheme dealing with the stolen wages of aboriginal Australians. These examples have been chosen because they illustrate different types of injustice and highlight the remedial potential of a wide variety of private law's doctrines and remedies. In all of these cases, a public apology has already been made in respect of the injustice in question, so that institutional responsibility for repair has been firmly accepted. Part IV then seeks to draw together some of the lessons that private law has to offer to extra-legal mechanisms of redress. Part V briefly states our main conclusion, namely that private law doctrines and remedies, far from being irrelevant, provide a rich normative resource upon which to draw in designing reparations responses.

II. INSTITUTIONALISED ABUSE

In this section we discuss together historic, physical and sexual abuses committed both in the Australian Defence Force (ADF) and by clergy (focusing on the Australian Catholic Church). Close factual and legal parallels exist between these phenomena. Both organisations are hierarchical, male-dominated and attended by internal norms and codes of conduct which are invisible to the outsider. Beyond this, 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 the activities of both institutions fall within the broader framework of the 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.

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 review[8] into allegations of sexual and other forms of abuse

[8] On 11 April 2011 the Minister for Defence announced a series of reviews (since completed) into aspects of defence and ADF culture, including the DLA Piper review of allegations of sexual and other forms of abuse in defence. Recommendation 7 of the DLA Piper report appears to have provided the impetus for establishing a "capped compensation scheme", although in its final version the DART scheme does not purport to provide 'compensation' but 'reparation'. Recommendation 8 suggested a "framework for private facilitated meetings between victims, perpetrators and witnesses of abuse within defence", interpreted by DART as a mechanism of restorative justice. This is now

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.[9]

On 26 November 2012, the Chief of the Defence Force, General David Hurley delivered an apology to members of the ADF and defence employees who had suffered sexual or other forms of abuse in the course of their employment.[10] A Parliamentary apology was made by Defence Minister Stephen Smith, on behalf of the Government, on the same day.[11]

The Taskforce response 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'). Additionally, particular cases may be referred to the Chief of the Defence Force for '…military discipline, administrative sanction or other administrative action.'[12] In some circumstances, there is also scope for the matter to be referred to civilian State and Territory police authorities.[13]

The Reparations Scheme covers allegations of 'abuse', which is defined to mean sexual abuse, sexual harassment, physical abuse or workplace harassment and bullying.[14] 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, the following factors must be considered:[15]

- 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);
- whether the alleged abuser was an employee of Defence;
- whether there is a connection between the alleged abuse and the Defence employment

---

embodied in the Restorative Engagement program; DART, *First Interim Report to the Attorney General and Minister for Defence* ('*1st Interim Report'*), March 2013, 25.

[9] DART, *Third Interim Report to the Attorney General and Minister for Defence*, September 2013, 2. The cut-off date for DART to accept new allegations of abuse was 31 May 2013 (30 November 2014 for providing forms and documentation). The operation of the scheme has thus been extended until 30 November 2014.

[10] http://video.defence.gov.au/#searchterm,0,david%20hurley,All

[11] Hansard House of Representatives 26 November 2012, The Hon Stephen Smith MP, page 13105 (Ministerial Statement, Abuse in Defence).

[12] DART, *Fourth Interim Report to the Attorney-General and Minister for Defence*, ('*4th Interim Report'*) December 2013, 7. The decision whether to refer a matter rests with the task force 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. However, where the task force identifies an " …actual or potential risk to defence personnel from an alleged abuser who is still serving" a referral for military justice may nonetheless be made. The fact that the alleged abuser has potentially committed a criminal act will be a relevant consideration in making this decision.

[13] DART, *4th Interim Report*,14. Where the complainant chooses to engage in Restorative Engagement, this may impact whether a criminal investigation can simultaneously proceed. The complainant may choose to delay participation in Restorative Engagement until she has received police advice that it is appropriate to do so. See *4th Interim Report*, Appendix G (Restorative Engagement and Criminal Investigation Fact Sheet) 58-59.

[14] DART, *Second Interim Report to the Attorney-General and Minister for Defence*, June 2013, ('*2nd Interim Report'*) 6

[15] DART, *2nd Interim Report*, 6. Note it is not clear from the examples given (and particular decisions are not made public) whether the reparation scheme would apply to a civilian (who had never been a member of the ADF nor an employee) who had been abused by a member of the defence forces. Thus, unclear whether both the abused and the abuser must have a connection to defence. However, this does not alter our analysis of the terms of reparation which is the focus for this project. Note that under "Eligibility": " a person who was employed in defence, **and** plausibly suffered abuse at the hands of another employee E of defence, can make an application" in DART, *Fifth Interim Report to the Attorney-General and Minister for Defence ('5th Interim Report')*, March 2014, Appendix F (The Differences Between Claims to the Defence Abuse Response Task force and the Department of Veterans' Affairs),53.

- whether the alleged abuse occurred prior to 11 April 2011; and
- whether 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 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, [16] which means '…having the appearance of reasonableness.'[17] This is lower than either the civil standard of 'the balance of probabilities', or the criminal standard of 'beyond reasonable doubt'.[18] 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 which "…occurred in the same Defence institution."[19] 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, in four categories:

- Category 1 Abuse: $5,000 (eg single incident of physical assault with no serious injury. This may also fall into category 2)[20]
- Category 2 Abuse: $15,000
- Category 3 Abuse: $30,000
- Category 4 Abuse: $45,000 (eg serious sexual assault)[21]
- Mismanagement Payment: $5,000

In determining whether a person qualifies for a payment, and its level, the Assessor takes into account "... all plausible, in scope, abuse experienced by a person prior to 11 April 2011."[22] Relevant factors in the exercise of the discretion in Categories 1-4 include (without limitation):[23]

- whether the person suffered one or more instances of plausible abuse;
- the nature and seriousness of the abuse;
- the time period over which the abuse occurred;
- whether there was one or more alleged abuser;
- the seniority or rank of the alleged abuser(s);
- whether the abuse was witnessed or encouraged by others;
- the person'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 when assessing the seriousness of abuse" given that the "…circumstances of abuse of individual cases

[16] DART, 2nd *Interim Report*, Appendix C (Plausibility Factsheet).
[17] DART, 2nd *Interim Report*,5.
[18] DART, *2nd Interim Report*, Appendix C (Plausibility Factsheet).
[19] DART, *2nd Interim Report*, Appendix C (Plausibility Factsheet).
[20] DART, *2nd Interim Report* , Appendix N (FAQs).
[21] DART, *2nd Interim Report*, Appendix N (FAQs).
[22] DART, *4th Interim Report,* 9.
[23] DART, *4th Interim Report*, 9.

can vary almost infinitely."[24] 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:[25]

- failed 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;
- failed to take reasonable management action to stop abuse occurring in circumstances in which Defence knew or ought to have known of it, and in which the particular complainant did not report the abuse because of that failure;
- failed 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;
- failed to take reasonable management action in response to abuse in circumstances in which 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.[26] The Taskforce's *Second Interim Report* provides a useful hypothetical case designed to illustrate this, most severe, type of case.[27]

Alongside the Reparations Scheme are the possibilities of Restorative Engagement and referral to the Counselling Program. Under Restorative Engagement, complainants meet privately with senior Defence representatives in a conference. Although all complainants will have already have received the blanket public apologies delivered in November 2012, the process offers an opportunity for a one-on-one encounter with the institution. It is not a meeting with the abuser, but rather a forum that allows for the personal account of the abuse to 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 representative[28] and the complainant (with a support person present if desired) will have a series of face-to-face restorative engagement conferences, although it is also contemplated that in some cases indirect exchange may be the best means of communication (for example tape recordings,

[24] DART, *2nd Interim Report,* Appendix N (FAQs).
[25] DART, *4th Interim Report*, 9.
[26] DART, *5th Interim Report,* 17.
[27] DART,*2nd Interim Report,*14-15: the case of 'Miss Y' describes a year of continual harassment culminating in sexual assault and rape committed by two male cadets, together with a failure by a senior officer to respond appropriately to complaints and an attempt to hush the incident up. Note that no reference is made in this example to the severity of the *consequences* of these events on the female cadet in question.
[28] The Chief of the Defence Force, 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 as part of the program. It is also contemplated that other senior defence leaders will be involved and that these will be 3-star rank (Lieutenant-General and equivalent) down to and including Colonel (and equivalent). DART, *4th Interim Report*, Appendix F (Restorative Engagement Program Framework), 52-53.

electronic or paper mail, or telephone) to meet the needs of claimants.[29] It is expected that Restorative Engagement will continue beyond 30 November 2014 in order to meet the anticipated 1000 plus complainants who have requested this as an outcome.[30]

The final element of the scheme - the Counselling Program - supports complainants throughout the process and it seems that the commitment to fund counselling sessions for complainants is open-ended. The need for such sessions is identified as a "legacy issue and continuing program".[31]

B. *Clergy Abuse: Inquiries and Church Reparations*

The phenomenon of clergy abuse of children and vulnerable others was recognised on 11 April 2014 by a form of oral Papal apology. In the course of this apology, Pope Francis 'personally took on' the evils perpetrated, requested 'forgiveness for the damage done' by them 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."[32] This was followed on 7 July 2014 by a homily delivered by Pope Francis at a mass attended by victims of sex abuse by Catholic priests in which he "…ask[ed] for the grace to weep … and make reparation" and acknowledged the suffering of victims and their families. Pope Francis "…express[ed] [his] sorrow … and humbly ask[ed] forgiveness."[33] 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 statement of apology can be found through a search of the Holy See website.[34]

Clergy abuse in Australia is well documented. The *Commonwealth Royal Commission (Royal Commission) into Institutional Responses to Child Sexual Abuse* was established by Letters Patent on 11 January 2013. Its remit includes the clerical abuse of children, but does not extend to the broader phenomenon of clerical abuse, which includes the abuse of adults. Nonetheless, the Commission's work has great relevance. There have also been two State level inquires: *Betrayal of Trust Inquiry into the Handling of Child Abuse by Religious and Other Non-Governmental Organisations*[35] (Victorian Parliamentary Inquiry) 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* (NSW Royal Commission).[36] It is difficult to write on this topic in a quickly changing landscape. Hopefully what follows will not already be out of date.

---

[29] DART, *4th Interim Report*, Appendix F (Restorative Engagement Program Framework), 52.
[30] DART, *5th Interim Report*, 11.
[31] DART, *5th Interim Report*, 39.
[32] http://w2.vatican.va/content/francesco/en/speeches/2014/april/documents/papa-francesco_20140411_ufficio-cattolico-infanzia.html (accessed 4 June 2014). Pope Francis made this statement at an address to members of the International Catholic Child Bureau at the Vatican on 11 April 2014.
[33] 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) (accessed 4 September 2014).
[34] http://www.va/phome_en.htm (accessed 4 June 2014 and 4 September 2014). There is the text of the speech on 4 June 2014 in which this paragraph was contained, but the speech covered various topics concerning the wellbeing and education of children. It was not a formal speech of apology directed specifically to the history of abuse within the Catholic Church. See http://w2.vatican.va/content/francesco/en/speeches/2014/april/documents/papa-francesco_20140411_ufficio-cattolico-infanzia.html (accessed 4 June 2014). Similarly, the text of the homily delivered on 7 July 2014 is available at (http://w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco_20140707_omelia-vittime-abusi.html) (accessed 4 September 2014).
[35] 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).
[36] *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.

Although one of the Royal Commission's objectives is to look at "support and redress" for victims of child sexual abuse;[37] no such measures systematically exist. In 2010, the Australian Catholic Bishops Conference set in place *Towards Healing*: *Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia* ('*Towards Healing'*).[38] This protocol is used in all Catholic diocese and religious orders in Australia except for the Melbourne Archdiocese, which has had its own measures in place since 1996 in the guide of the *Melbourne Response*.[39] Both are private systems of reparation for those who have suffered sexual and other abuse by priests and those under the control of the relevant Archbishop or church authorities. The *Melbourne Response* expressly specifies that payments are made *ex gratia* and caps them at $75,000. Counselling and apology may also be offered.[40] *Towards Healing* commands a response "…to the needs of the victim in such ways as are demanded by justice and compassion. Responses may include the provision of an apology on behalf of the Church, the provision of counselling services or the 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 in not legally liable."[41] In other words, the amount paid is again entirely *ex gratia.*

The Royal Commission has sought submissions on the operation of both the *Melbourne Response* and *Towards Healing*. Those made by Slater and Gordon[42] and John and Nicola Ellis (Solicitors)[43] are important accounts of the way both schemes operate 'on the ground'. Whilst the *Melbourne Response* caps payments at $75,000, amounts paid under *Towards Healing* are described as 'modest', often being between $20,000 to $40,000.[44] The Ellis submission reports that in practice payments under the latter scheme are also subject to a notional cap.[45] The church is reported to have claimed to have made some 600 awards under *Towards Healing* in respect of claims in Victoria.[46] It is difficult to determine the exact amounts paid to victims since in many cases, Slater & Gordon report, "… [t]here have been releases signed under protocols between the parties that have denied liability and sought confidentiality."[47] There is no formal right to appeal or review a decision under either process, despite an obligation at least under *Towards Healing* to give reasons for the assessor's decision and to provide these to the complainant. Moreover, the obligation to give reasons does not cover decisions as to reparation, only findings as to misconduct.[48] There is also doubt about the guiding principle informing the assessment of amounts. The *Melbourne Response* speaks specifically of 'compensation' whereas under *Towards Healing* it is "…Financial assistance or reparation" which is to be paid.[49] The lack of transparency of process and the lack of review mean that, in the submission of Slater & Gordon

[37] http://www.childabuseroyalcommission.gov.au/research/research-program (accessed 2 June 2014).
[38] Australian Catholic Bishops Conference and Catholic Religious Australia, January 2010.
[39] Catholic Archdiocese of Melbourne, September 2012.
[40] *Melbourne Response*, Catholic Archdiocese of Melbourne, September 2012.
[41] *Towards Healing*, Australian Catholic Bishops Conference and Catholic Religious Australia, January 2010, 41.1.
[42] 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* released 9 July 2013 (Slater & Gordon Submission).
[43] John Ellis and Nicola 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 Submission).
[44] Slater & Gordon Submission, [69]-[70].
[45] Ellis Submission [16].
[46] Ibid, [51].
[47] Slater & Gordon Submission [65].
[48] Slater & Gordon record [78] a suggestion made that there is a limited right under O56 of the *Supreme Court Rules* (Vic). See *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."
[49] *Towards Healing*, [41.1].

"…[t]here is no real way of determining how a complainant's award of compensation is assessed."[50]

The *Melbourne Process* comprises an Independent Commissioner and a Compensation Panel. Decisions are made by an Independent Commissioner who "…makes a determination on the basis of the evidence" and must be "…satisfied that the abuse occurred".[51] 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".[52] Compensation is available through the Compensation Panel which recommends whether an *ex gratia* payment should be made, in which case a Deed of Release is signed by the parties.[53] The standard of proof under which investigators work is the balance of probabilities.[54] The Independent Commissioner is required, "…upon becoming aware of sexual or other abuse (which may constitute criminal conduct) …[to] …report that conduct to the police."[55]

Towards Healing is a more bureaucratic, multi-party process. Ultimately, the Director of Professional Standards appoints Assessors to conduct an 'assessment'. The purpose of the assessment 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."[56] The assessors draft a report which, together with other information such as any 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' at which the victim and representatives of the Church Authority are present (together with their lawyers, although the victim may not be legally represented) a reparation offer and an apology may be made.[57]

Assessors are directed to make findings on the balance of probabilities,[58] ensuring that a written or taped record is made of all interviews.[59] There is an obligation to provide reasons and to provide these to the complainant.[60] However, this is only as to the assessment process, the finding of misconduct. It does not speak to the reparations phase. Nonetheless, there is an overriding commitment to pass details of any alleged criminal offence to the police, protecting where requested the identity of the complainant.[61]

Both models contain a commitment to reporting criminal offences to the police, but historically the evidence against compliance with any such obligation is overwhelming. Rather, the documented pattern was instead to cover up and hide allegations of abuse, moving clerics from diocese to diocese thus making it even more difficult to detect and apprehend those who had committed criminal offences.[62] It is beyond the scope of this discussion to comment on this

[50] Slater & Gordon submission [74].
[51] *Melbourne Response*, Catholic Archdiocese of Melbourne, September 2012.
[52] *Melbourne Response*, Catholic Archdiocese of Melbourne, September 2012.
[53] Victorian Parliamentary Inquiry, 20.1.1.
[54] Paul Murnane, *Reply Submission to the Victorian Parliamentary Inquiry*, 23 February 2013, page 2.
[55] *Sexual and Other Abuse - The Melbourne Response Appointment of Independent Commissioner*, Catholic Archdiocese of Melbourne, approved on 15 February 2011 (Archbishop Denis Hart DD).
[56] *Towards Healing* [40.2].
[57] *Towards Healing* [41.4] and its parts.
[58] *Towards Healing* [40.9].
[59] *Towards Healing* [40.8].
[60] *Towards Healing* [40.9.1] and [40.9.3].
[61] *Towards Healing* [37.4], [37.5].
[62] See for example 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) volume

pattern, other than to note that there has thus been dissonance between the reparation promised by both schemes and that delivered in practice. Additionally, work done by Tapsall suggests that, at least in so far as a failure to report abuse to police and other authorities was concerned, this secrecy was, and *still is*, itself a requirement of Canon law.[63] Recall that, within its own terms, the *Melbourne Response* states that the "…Office of the Independent Commissioner … acts… in accordance … with Victoria Police, the principles of natural justice and *relevant provisions of Canon Law*."[64] Put simply, it is possible that once reason for the cult of secrecy within the Church, in apparent contradiction to its own policies on reparation, is the higher command of Canon Law.[65] It is also notable that neither *Towards Healing,* nor the *Melbourne Response* have the force of Canon Law.[66] Canon Law is that which is issued by the Pope by edict from Rome.[67] If a Bishop in a Diocese in Australia wished to ignore these systems of reparation, there is therefore little that could be done to force compliance. Unless these reparatory models are backed by the authority of Rome (and to date neither have been), compliance ultimately remains optional within each Diocese.

C. *Abuse Reparation: Private Law Principles and Analogues*

Private law's strategy for dealing with cases of abuse of the kind detailed above is primarily through the law of torts, in particular the torts of assault, battery and negligence. Although attempts have sometimes also been made to bring claims against abusers and institutions for the equitable wrong of breach of fiduciary duty, they have universally failed in Australia on the basis that fiduciary duties relate to economic and property interests, not to aspects of a victim's physical or mental welfare.[68] There is no exact private law analogue in the common law of torts

---

1: [7.3.6] "Failure to report crimes and treatment of offenders", [7.3.7] "Relocation and movement of priests", [7.3.8] "Failure to act on complaint from an internal source".

[63] *Crimen Sollicitationis* ("On the Manner of Proceeding in Causes of Solicitation"), a Papal 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 of others. This decree has been affirmed and extended by subsequent popes, most recently in 2010 by Pope Benedict XVI. See http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (accessed 4 June 2014). The (re)discovery of this point of canon law and its potential significance are discussed in K Tapsall *Potiphar's Wife* (ATF Press Ltd, Adelaide 2014)chapter 7. See also 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) volume 1, [1.3] referring to the instruction of secrecy and specifically the instruction sent to all bishops entitled *Crimen solicitationis*: "We do not know to what extent this instruction directed responses in the Catholic Church in Australia. However, given the clergy's obligation to be obedient, and the Church's hierarchical structure, the Committee believes it is reasonable to think that Church members followed the instruction. At the very least, the instruction would have been highly influential. This could partly explain why an apparent policy of concealment continued for the next 30 years. Certainly, the instruction would have provided comfort to those who were reluctant to attract public embarrassment or expose fellow religious to criminal prosecution by reporting their offending. It probably also increased perpetrators' sense of freedom to act, and let them assume that their Church would protect them if their crimes were detected."

[64] *Melbourne Response*, Catholic Archdiocese of Melbourne, September 2012 (emphasis added).

[65] This argument is made by K Tapsall *Potiphar's Wife* (ATF Press Ltd, Adelaide 2014), ch 7.

[66] Tapsall, 85. This contrasts the position in the United States where Tapsall argues (at 86) the American Catholic Bishops Conference obtained an approval (in the form of a *recognitio*) for "…an exception to pontifical secrecy where the local law required it." See also: Tapsall, 245.

[67] "The source of all canon law is the pope. Canon 331 of the *1983 Code of Canon Law* provides that the pope possesses by virtue of … office, supreme, full, immediate and universal ordinary power in the Church, which he is always able to exercise freely. "There is no appeal … and the pope is to be judged by no one." Tapsall, 80.

[68] *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*,* both applying *Paramasivam v Flynn* (1998) 160 ALR 203. Note that the position is different in Canada, where actions for breach of fiduciary duty have met with some success.

that deals with cases of bullying and harassment resulting in mere distress[69] (which do potentially fall within the above schemes), but claims are available for the intentional or negligent inducement of psychiatric harm[70] and in some jurisdictions there are statutory harassment actions that give rise to civil damages awards.[71]

As regards tort actions, the main obstructions lie with well-documented evidential problems (such as the death of witnesses or abusers) and the operation of limitation provisions, although there are recent signs in the Australian case law 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 may assist in more recent cases of child abuse. In some instances, the operation of the relevant provisions is further postponed as a result of a victim's justifiable failure to connect complex psychiatric effects with the earlier abuse. Indeed, in *Rundle*, this has resulted in an action being allowed to proceed some 38 years after the abuse took place.[72] Although limitation rules hence obstruct the claims of those of majority age who have for (usually[73]) three years or more known of the abuse, known that mental injuries that have manifested themselves are connected to abuse; and who are sufficiently capable of turning to litigation, it is not *always* the barrier that it is sometimes assumed to be.

1. Frameworks of Responsibility

Where abuses are perpetrated within an institutional setting, there are two different frameworks of private law responsibility that are potentially capable of operating in tandem. The *first* attaches liability directly to the abuser. This has the benefit of producing direct personal accountability of the wrongdoer to the wronged (assuming the abuser is still alive and in the jurisdiction). However, the downside is that it in practice yields nugatory compensation where the abuser is impecunious, as will often be the case with an offending priest. Poverty, a norm encouraged by the Church, hence ironically insulates abusers against the legal responsibilities they would otherwise bear in private law to make good the consequences of their behaviour.

The *second* framework attaches liability to the institution itself. This framework is often preferred precisely because it avoids the risk of a hollow remedy. There are in turn two ways of sheeting liability home to the institution itself: either by holding it liable for its own 'direct' failings or by making it 'vicariously' liable for acts of the abuser. We consider these two possibilities sources of institutional liability in turn.

Turning first to direct personal failings of the institution, these may consist in culpable carelessness in appointing an abuser to a position of responsibility, failing to supervise him, or improperly placing a child or other vulnerable person in his care. Negligence claims against

---

[69] 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.

[70] Wilkinson v Downton [1897] 2 QB 57- practical joke gone wrong; *Oyston v St Patrick's College* [2013] NSWCA 135- school liability in negligence for bullying.

[71] For example, *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.

[72] *Rundle v Salvation Army (South Australia Property Trust) and Anor [2007] NSWSC 44.* For other, favourable results on limitation, see, similarly*: 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 NSW* [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).

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

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.[74] Tort liabilities for carelessly 'failing to protect' victims (omissions) can and do arise in the law of negligence from the combination of specific powers or authority on the part of an institution giving control over the risk (in this case the abuser) together with reliance and/or vulnerability on the part of the victim.[75] Abuse in the ADF cases fits this paradigm closely given the direct relationships of authority that exist between the institution and both the abuser and abused. Failure of a government caseworker to report suspected abuse to the police can also result in liability, whether or not there is a statutory mandatory reporting requirement.[76] A potential stumbling block for claims lies in the need to gather sufficient evidence that the institution itself had actual or constructive knowledge of the risk of abuse, such that it ought to have acted to prevent it. This is sometimes tricky given the secretive nature of the crimes in issue, but it may not be an insuperable hurdle when institutions are known to have deliberately swept incidents under the carpet.

Moreover, in some cases, it is now clear that an institution's own, direct liability for wrongs can sometimes be *strict* in the sense of being *completely independent of any finding that the institution's own conduct is at fault*. In such cases, the institution is said to owe a personal duty to ensure that reasonable care to protect the injured person *is taken*. 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. Christine Beuermann has convincingly suggested that such direct, strict liabilities can be justified in abuse cases where the institution creates a risk for victims by placing them directly under the abuser's authority and control.[77] In practice, both Australian and Canadian courts have been reluctant to recognise the existence of non-delegable duties of care in such instances,[78] 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 vicariously liability. 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 reasonable care is taken of victims by all of its various agents. But vicarious liability doctrine runs into some difficulty in cases in which the abuser is not technically an employee of the institution, as we see below. Beuermann's strict, personal duty analysis carries significant advantages over vicarious liability doctrine in this regard and discloses an important rationale for attaching strict liability to the institution in instances in which it has bestowed authority on the abuser over the victim.

Independently of any personal liability it attracts, an institution might also be fixed with strict, *vicarious* liability for an abuser's tort. This is the second way of sheeting home liability to the institution. In such instances, whether or not the institution has failed in a duty of its own is beside the point, because it is being made accountable for another's wrong. In clergy abuse cases, this route has proven a non-starter in Australian Courts both because the 'Church' is not recognised as a corporate entity to which vicarious liability can attach; and because the

[74] *SB v NSW* [2004] VSC 514.
[75] E.g., *Swan v State of South Australia* (1993) 62 SASR 532 (control over sexual abuser out on parole); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (control over health and safety risks and over the plaintiff's exposure to them); *Metropolitan Police Commissioner v Reeves* [2000] 1 AC 36 (police control over suicidal prisoner); *New South Wales v Budjoso* (2005) 222 ALR 663 (prison control over risk of battery of one inmate by others).
[76] *TC v New South Wales* [2001] NSWCA 380; *DC v NSW* [2010] NSWCA 15 (leave to proceed to trial granted).
[77] C Beuermann, 'Vicarious Liability and Conferred Authority Strict Liability' (2013) TLJ 265.
[78] *NSW v Lepore & Anor* [2003] HCA 4*; B (KL) v British Columbia* (2003) 230 DLR (4th) 513.

relationship between priests and the church as an unincorporated association is deemed technically incapable of amounting to 'employment'.[79] These hurdles have been ignored or sidestepped elsewhere in the common law world.[80] Ironically, Cardinal Pell's written statement at the recent *Royal Commission* hearings into the Catholic Church's conduct of the Ellis litigation indicates a willingness for the Church to '…be treated like any other organisation and pay damages…'.[81] Even taking the point that church assets may held by separate legal trust entities, it is clear that trustees can be held liable in negligence and that a determined court could pierce the trust to find the trust liable.[82] Cardinal Pell's professed public readiness to step away from the technicalities of the Catholic Church's legal status nonetheless contrasts obviously and embarrassingly with its private strategy when it comes to defending litigation.

In the ADF abuse configuration, there is more obvious mileage in vicarious liability solutions. However, it is still unclear whether an abuser would be regarded as acting 'within the course of his or her employment' when engaging in deliberate criminal misconduct. The position in Australian law is uncertain because, applying traditional tests,[83] such conduct does not either actually or ostensibly advance the interests of an employer institution. Abuse is not obviously an 'enterprise risk', the costs of which a business or institution might normally expect to internalise as part of its operation. Vicarious liability may nonetheless attach where the employer gives the abuser a job that generates a high degree of power and intimacy between himself and the victim, going beyond the mere factual opportunity to engage in the abuse.[84] Many priest-victim and some defence-force relationships involving authority could arguably 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[85] and it is interesting that some of these tests (in particular one which looks for a 'close connection' between the abuser's employment and the abuse and focuses on risks and vulnerabilities that job may create for the abused) bear close resemblance to some of the factors bearing on the admissibility of claims under the DART reparations scheme. To this extent, the design of the DART scheme appears roughly to approximate the pattern of institutional responsibility already existing at law. Whether it goes any further (for example, whether it is available to one who is not actually a member of the ADF, but who has been abused by such a member; or whether it is available to one who is such a member, but who has been abused by someone else who is not) will depend on the extent to which the admissibility criteria are rigorously adhered to.

---

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

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

[81] 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.'

[82] *Various Claimants v Catholic Welfare Society* [2013] 2 AC 1, 15 (Lord Phillips) 'Because of the manner in which the institute [a charitable trust] carried on its affairs it is appropriate to approach this case as if the institute were a corporate body existing to perform the functions of providing a Christian education to boys, able to own property, and, in fact, possessing substantial assets.'

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

[84] *NSW 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 or based on estoppel) might also yield liability on some exceptional facts. See also For a more sophisticated 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 *Torts Law Journal* 265.

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

The two accountability frameworks provided by private law operate in tandem, so that claims can be directed against both the abuser himself and the institution. Their collective liability for the abuse is joint and several. [86] This means that if the abuser cannot pay (as is usually the case), the institution remains 100% liable for the injury suffered, although it retains the right to seek indemnity from the abuser if it wishes. The message that is derived from the private law doctrine of joint and several ('solidary') liability in cases of this type is therefore that all those responsible for the same harm are *fully* responsibility to pay for it even if their own role (in terms of fault or casual contribution) was very small in comparison to that of another responsible party. The institution must pay up in full if it turns out that the abuser is impecunious. This approach of 100% institutional responsibility, firmly embedded in private law, contrasts with the small payouts under DART and Church schemes, which tend to epitomise an attitude that the real liability belongs with the abuser and that institutions are only peripherally or secondarily responsible. To the extent that the schemes do reflect a view that the responsible institutions are not really 'primarily' to blame' for the abuse and so should not have to pay very much, they contradict the way risk of abuse and of the impecuniosity of the abuser is usually allocated in private law.

2. Causes of Action

Several features of the cause of action for trespass highlight the level of priority which the law accords 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. A trespass is also actionable *per se*, without proof of consequential damage. The action preserves not just a person's physical welfare, but fundamental moral and legal powers of *choice* that individuals have with respect to their bodies. The importance of preserving *individual choice* is further reflected in the remedies available for trespassory violations, detailed below. The strength of the law's protection of physical integrity through the tort of trespass is, we suggest, highly instructive. It tells us something critical about the level of priority that should be given to such interests in designing *any* reparations scheme, *whether legal or extra-legal*. From this point of view, it is senseless in our view to design a private reparations scheme for physical or sexual abuse without taking account of the way in which and the extent to which such interests have historically been protected in law. The law has a great deal to say about the 'just' type of response to interferences of this type and its message needs to be heard.

3. Tort Remedies:

Another feature of the law's response to cases of trespassory abuse is that its remedies are powerful. Whilst injunctive relief is rarely appropriate in cases of the current type and courts cannot ordinarily force apologies, the law nonetheless provides a variety of monetary remedies that reflect deep normative commitments to principles of *full* restoration *in status quo ante*; to the preservation of victim rights and powers of choice; to deterring wrongdoing, and to expressing strong disapproval of egregious conduct. These monetary remedies provide informative contrasts to those available under *DART*, *The Melbourne Process* and *Towards Healing,* highlighting what are in our view significant inadequacies. The discussion below focuses on two aspects of remedy: features of damages awards in trespass cases and procedural aspects of such cases.

[86] This remains the case in all Australian jurisdictions even after the introduction of proportionate liability provisions, since personal injury cases remain universally subject to the joint and several liability rule. See eg, Civil Liability Act 2003 (Qld) s 28(3).

Damages Awards

Compensatory damages awards at law contrast with scheme payments in various ways. Most obviously and importantly, they are dramatically higher in quantum. A quick survey of eight abuse cases of varying levels of severity in Australia since 2004 yields awards of between AUD $230,000 and AUD $2.4million, the 'average' compensatory sum falling around the AUD $580,000 mark.[87] This is nearly eight times the maximum amount available under any of the schemes, which is a staggering difference by any standard.[88] Judicial awards reflect both the devastating reality of the harms suffered by victims and the impact of the corrective justice norm at work within private law. This norm, as we indicate further in Part 4, mandates full restoration of a victim so as to erase the full effects of the wrong as best as can be done through monetary compensation, not simply an award that meets a person's current *needs* in terms of '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, awards 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 the DART scheme claims to provide 'individually tailored outcomes for complainants'[89] and grades different 'categories' of abuse, the level of individuation in awards is clearly much lower than at law and the grading system 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*; they devote concern for the victim in all aspects of their subjective hurt, rather than treating that person as just one member of a broader category. A related point is that 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.[90] Aggravated damages address serious personal indignities and are additional to amounts for physical and psychiatric harm, mental distress, and pain and suffering. The DART scheme does make reference to the rank of an abuser as a factor to take into account in the making of a payment (which might, we speculate, be relevant, to assessing a victim's humiliation), but otherwise there is no reference to equivalent heads of recovery in the various schemes.

Another key difference is that damages for trespass may include an additional sum by way of exemplary damages. Courts can, and often do, add such sums to compensatory awards in cases in which there has been a particularly egregious infringement of a victim's rights. The function of

---

[87] *SB v NSW* [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). Note that in 3 cases, these sums included elements of exemplary damages amounting to a total of $180,000). For the purposes of calculating an average global sum, exemplary elements have been excluded and the appropriate compensatory award in *Tusyn* has been notionally assumed to be $300,000.

[88] Note that significant 'caps' on personal injury damages now apply in many States and Territories in Australia, but, by comparison with the schemes we have looked at, they remains extremely generous. For example, in QLD, calculation of damages for loss of earning capacity is 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).

[89] DART, *5th Interim Report*, 28.

[90] *NSW v Ibbett* [2006] HCA 57.

exemplary awards is to deter wrongdoing and express firm institutional (judicial) disapproval of the acts in question. Such awards are available against an institution even when its liability is vicarious, not personal; [91] 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 and it is not part of our case here that reparations schemes should incorporate an exemplary element. Such deterrence aims are best left to the general law and thus are not a sphere in which we suggest reparations schemes may fruitfully mimic the approach of private law.

Subject to some statutory exceptions, damages awards are made in a single, once-and for all, lump sum.[92] Admittedly, this can cause difficulties of under-compensation in cases in which long-term prognoses are unclear, but it has the benefit of giving victims a level of certainty and full control over their compensation, including control over aspects of their future care, such as counselling, psychiatric and 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 some sorts of support service. As has been observed, 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, cup-in-hand, to their abuser.[93] The *ex-gratia* nature of this commitment undermines both victims' dignity and autonomy (control over their options), both of which are centrally implicated in cases of the current type. 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 its discretionary provision.[94] This is an aspect of regaining *control* over their lives and respecting the fact that remedies are secondary *entitlements* reflecting victims' prior *rights*.

As part of any lump-sum award, Courts grant interest as from the date of the abuse to the date of judgment. This can amount to a considerable sum (in some cases, almost as much as current reparation payment caps!) and is designed to account for the fact that victims have been kept (sometimes for decades) out of relief to which they are *entitled*. Once it is 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 just that their remedy should notionally be backdated to the date of the event, not simply made available from the day a case is eventually disposed of by the court. Interest is not available under any of the reparations schemes and this is most likely to be 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

[91] *NSW v Ibbett* [2006] HCA 57 at [43-4]; *NSW v Bryant* [2005] NSWCA 393.

[92] There are now some exceptions involving interim, provisional payments and (voluntary) structured settlements in Australia, but as a general rule both plaintiffs and defendants prefer the control and certainty that comes with a one-off, once-and-for-all payment in respect of all aspects of harm past and future: 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 actually provision in some cases for Courts to make compulsory periodic payment orders.

[93] Ellis submission to the Royal Commission [18.3].

[94] Although not associated with trespass actions, a common law analogue is *Griffiths v Kirkemeyer* (1977) 139 CLR 161 by which damages to compensate the plaintiff's negligently inflicted loss are assessed by reference to the plaintiff's needs created, including needs for future care. Subsequent statutory amendment, eg via s15 *Civil Liability Act 2002* (NSW), controls the parameters of what may be claimed, but does not derogate from this core concept of compensating a plaintiff's loss including loss defined by the needs created by the negligence.

law.[95] Broad aspirations of this type are also clear in the DART scheme to the extent that categories of abuse and their correlative payments are tiered, but the practical utility of this measure is limited by the fact that it is not possible to determine by reference to the (anonymised) facts of actual cases the conduct triggering particular reparation amounts. Similarly, the practice in clergy abuse cases of keeping awards secret is likely to obstruct equal treatment (and bound to undermine public confidence in it). Since information is power, the withholding of publicity from awards could be used as a cynical tactic by the Church to keep levels of compensation down. If reparations schemes are to provide compensation in the true sense (and not simply to meet the current needs of victims) then is seems sensible to permit, or perhaps even require, assessors to refer to legal precedents dealing with similar cases. Indeed, to exclude reference to judicial awards is peculiarly myopic.

Decisions of courts are fully independent, whereas under the *Melbourne Process*, Commissioners (who are certainly experienced lawyers) are appointed by the Church, as are members of the Compensation Panel. Under *Towards Healing*, there is not even a semblance of independence. 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.[96] Without in any way casting doubt on the integrity or competence of current decision makers, all schemes could usefully learn the lesson that when it comes to meaningful reparation, justice must not only be done, but *be seen to be done*[97] if it is to be legitimised in a public sense.

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 providing public reasons for awards under current, extra-legal schemes. Although there is a limited right to reasons in *Towards Healing,* this is only in relation to cleric misconduct not to any reparations decision.[98] DART issues three monthly reports in accordance with its Terms of Reference but these reports are designed merely to "…enable the Attorney-General and Minister for Defence to report to Parliament as appropriate."[99] Details of individual decisions, even reported on an anonymised basis, are not made available.

A related aspect concerns the reviewability of decision-making. Judicial awards are always subject to appeal, whilst awards under DART and church initiatives are clearly not. The possibility of a review as to 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 doubly important.

Finally, although judicial awards are subject to time bars, all limitations statutes contain discretionary mechanisms by which the time limit may be extended. Justice is always in principle open for business. By comparison, the DART scheme sets what appears to be an absolute, non-extendable reporting deadline. If this is truly the case, the scheme ignores lessons that judges operating within the legal system have accepted about the devastating effects that psychiatric

[95] Sadly the common law commitment to consistency of treatment in Australia is now undermined by varying statutory interventions in the States and Territories which impose different levels of damages cap; and provide for some different types of damages awards in different jurisdictions. This means, ironically, that exactly the same injury can yield different amounts of compensation within Australia, which is surely a disgrace. The common law system show far more integrity in this respect that the heavily politicised forms of judicial interventionism.
[96] DART, *1st Interim Report* Foreword.
[97] *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, *per* Lord Hewart CJ.
[98] *Towards Healing* [40.9.1] and [40.9.3].
[99] *Defence Abuse Response Taskforce: Appointment of Taskforce Chair and Taskforce Terms of Reference* December 2012.

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*.[100] However, no ongoing scheme of reparation appears to be intended.

Taken in the round, private law hence provides a set of informative contrasts with existing extra-legal 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 should be clear that it is not our claim that all compensation schemes should make awards as sizeable as those available at private law. Where such schemes are tax-payer funded and designed to ensure basic levels of welfare provision, it may well be appropriate to set lower levels of award, and reduce individuation in order to facilitate administrative efficiencies and broaden coverage. Such sacrifices in financial return may well be a price worth paying in exchange for a system that is broader, cheaper, more efficient and more easily accessible. 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 again not a general welfare scheme akin to a social security scheme, or a scheme to support victims of crime. All the schemes, including DART, are private[101] schemes devised and implemented by those implicated in, or accepting responsibility for wrongs that are admitted to have been done. Payments are offered by Defence and the Catholic Church in substitution for their moral and legal responsibilities. In Part IV below we argue that the most appropriate guiding principle to follow in such schemes is that of corrective justice. Anyone implicated in, or accepting responsibility for an acknowledged wrong should 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 the proper remedy were a matter of *ex gratia* private discretion. There is therefore a critical distinction between general social welfare schemes (on the one hand) and private reparations schemes that are created and funded by institutions responsible, or accepting responsibility for injustices (on the other). The latter ought more closely to map some of the features of private law solutions.

III. STOLEN WAGES

A. Stolen Wages: History and Reparative Scheme

Aboriginal workers in Australian states were historically paid less than their white counterparts under discriminatory employment practices.[102] A particular aspect of this system of discrimination were the various statutory schemes and administrative policies which made it possible for governments to control Aboriginal people's money. Different states had different regimes, but all followed broadly the same path of taking money from Aboriginal people and

[100] http://www.defence.gov.au/sempro/ (accessed 1 July 2014)
[101] 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.
[102] For example, see (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).

placing these funds 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 which existed in New South Wales.[103]

Aboriginal people fell under the purview of the Aborigines Welfare Board (the Board)[104] which pursuant to the *Aborigines Protection Act* 1909 (NSW) had statutory duties "….including to 'exercise a 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."[105] This legislation was repealed in 1969 and the Board abolished.

The Board could and did force aboriginal or mixed race children into labour.[106] It did so pursuant to so-called "apprenticeships" in which the child could be indentured in return for a small weekly wage, described as "pocket money" (typically 20% of the wages payable). The level of wages paid to Aboriginal apprentices overall, themselves artificially low,[107] was set by regulations made under the legislation. The balance of the week's wages were to be paid to the Board to be 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.[108] The Board was entitled to spend the wages it collected on behalf of the apprentice in the interests of the apprentice child as it saw

---

[103] We are indebted to the work of Sean Brennan and Zoe Craven in documenting the spider's web of legislation making up this system. See S Brennan and Z Craven " "Eventually they get it all …" Government Management of Aboriginal Trust Money in New South Wales" [2007] UNSWLRS 45. This system was later documented by the Australian Senate in Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006).

[104] The precursor was the Aborigines Protection Board established in 1883. This was in 1940 renamed the Aborigines Welfare Board.

[105] S Brennan and Z Craven " "Eventually they get it all …" Government Management of Aboriginal Trust Money in New South Wales" [2007] UNSWLRS 45, 7.

[106] s11(1) *Aborigines Protection Act* 1909 (NSW) '…by indenture bind or cause to be bound the child of any aborigine or the neglected child of any person apparently having an admixture of aboriginal blood." There was an obvious interaction between this 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 Haskin "& so we *are* "Slave owners"!": Employers and the NSW Aborigines Protection Board Trust Funds" (2005) 88 *Labour History* 147.

[107] Haskins records for example that Aboriginal apprentices were paid less than Child Welfare Department apprentices for many years: "[t]hc wage rates, set in 1913 (two shillings; and sixpence a week for a first-year female apprentice, up to 5 shillings for a 4th-year), and only minimally raised in the late 1930s, were not made equivalent with those paid to Child Welfare Department apprentices in NSW until 1941; the discrepancy between the rates by that time was to 'the extent of £1 per quarter [three months] for the younger children to £3 per quarter for youths ,and older girls 17 to 18years of age'. See V Haskin "& so we *are* "Slave owners"!": Employers and the NSW Aborigines Protection Board Trust Funds" (2005) 88 *Labour History* 147, 149.

[108] S Brennan and Z Craven " "Eventually they get it all …" Government Management of Aboriginal Trust Money in New South Wales" [2007] UNSWLRS 45, 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, see s3(a)(ii) *Aborigines 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 Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) [4.62] relying on the evidence of Dr Susan Greer: "…The files indicate that rather than taking the initiative to inform beneficiaries of their entitlements, the onus was on account holders to apply for their funds. Underpinning these practices was an assumption that beneficiaries had knowledge of their entitlements, and the ability to negotiate with the Board for their return, which anecdotal evidence of Aboriginal people caught up in this system would seem to contradict."

fit.[109] There was an additional problem, which was that apprentices would often discover at the end of their service that their employer had not been making wage payments on their behalf to the Board.[110] 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.

Work done by Haskins indicates that the 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.[111] In reality, much of money collected and held on trust remained in government hands and was never paid out. Poor record keeping, the real risk of fraud,[112] administrative inaction and the practical reality that without their employer or ex-employer's support in approaching the Board for repayment,[113] meant that Aboriginal workers stood little chance of success in accessing their money. By the time 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.[114] 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 the Department of Youth and Community Services) 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* and thus remain outside the mechanism of reparation.

On 11th March 2004, the New South Wales Premier The Hon Mr Bob Carr formally apologised to the Indigenous People of NSW and undertook to return any monies 'established' as being owed to them.[115] The New South Wales Government then established the *Aboriginal Trust Fund Repayment Scheme* (ATFRS), which was administered by a specialised unit within the NSW Department of Premier and Cabinet. ATFRS, which closed on 31 December 2010, comprised a three-person panel which made recommendations on repayments to the Minister for Aboriginal

---

[109] "…wages… and may expend the same as the board may think fit in the interests of the child" s11(1) *Aborigines Protection Act* 1909 (NSW). Brennan and Craven above n 103 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).

[110] Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) [4.63], relying on the evidence of Professor Ann McGrath.

[111] V Haskin "& so we *are* "Slave owners"!": Employers and the NSW Aborigines Protection Board Trust Funds" (2005) 88 *Labour History* 147, 149.

[112] Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006), [4.41] and [4.49] ff.

[113] V Haskin "& so we *are* "Slave owners"!": Employers and the NSW Aborigines Protection Board Trust Funds" (2005) 88 *Labour History* 147, 161.

[114] http://www.creativespirits.info/aboriginalculture/economy/stolen-wages-timeline accessed 30.5.2014.

[115] New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 March 2004 item 12 (aboriginal trust funds) (Bob Carr): "I invite the House to turn its attention to another legacy of misguided paternalism—the fate of Aboriginal trust funds. These were funds into which New South Wales Aborigines were forced—from 1900 to 1969, the year the Aborigines Welfare Board was abolished in light of the 1967 referendum—to pay their wages, their pensions, their family endowments, their inheritances and lump sum compensation payments into a trust. Those funds were held in trust, and our predecessors failed that trust. …When in the years up to 1969 Aboriginal people sought to gain access to their accounts they were rarely paid. After 1969 payments ceased completely. For those reasons I take this opportunity to formally apologise to the Aborigines affected and offer the assurance that any individual who can establish they are owed money will have it returned." This was followed on Wednesday 13 February 2008 by the Apology delivered by the Prime Minister the Hon Kevin Rudd MP to Australia's Indigenous peoples http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples (accessed 2 June 2014).

Affairs. The funds eligible to be repaid were those held in trust accounts by the Board between 1900 and 1969. After an initial period of operation commencing in 2004, AFTRS was amended in 2009 such that the following guidelines applied to the processing of claims. Although ATFRS started out as a system which proposed repayment of amounts actually held (or approximation thereof),[116] it became a system of *ex gratia* payment.

All successful claims 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 for Aboriginal Affairs' discretionary powers and without any admission of liability.[117] 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 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.'[118] This $11,000 limit whilst operating perhaps to improve the position of some claimants also operated to limit the position of other claimants who could demonstrate that they were owed more than that under the trust scheme.[119]

In order to claim, ATFRS required "…strong and reliable evidence showing that money [was] owed from a government controlled trust-fund account."[120] 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,[121] 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."[122]

Under the ATFRS when there was insufficient or ambiguous evidence to substantiate an application under the scheme, the claimant then 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.[123] 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

---

[116] Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (February 2006) Appendix A.
[117] Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (June 2009), 12.3.
[118] Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (June 2009), Attachment Form One: Final Proforma Letter and Form to be sent to claimants requesting electronic banking details and acknowledging a repayment is being made.
[119] V Mawuli "Stolen Wages Evidentiary Challenges for Claimants" (2010) 7 *Indigenous Law Bulletin* 8, 10. Under the pre 2009 scheme, claimants were entitled to the full amount owed, subject of course to being able to establish an 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 to do so, provided such claimants 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.
[120] 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 too Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (June 2009) 5.1.1 which enjoined the panel to provide advice to the Minister and ATFRS "…on the operation of an evidence-based repayment scheme".
[121] Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) [7.92]-[7.101].
[122] Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (June 2009), 4.2, 5.5.
[123] V Mawuli "Procedural Challenges in the Stolen Wages Scheme" *PIAC Bulletin* No 31 May 2010, 1.

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.[124]

The ATFRS also included the provision of practical support and counselling for claimants.[125]

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. Despite an obligation on the Board under the *Audit Act* 1902 (NSW) in respect of the administration of trust accounts which required for example 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,[126] and a correlative obligation to document payments out via the preparation of a warrant stating the amount and purpose of a withdrawal,[127] 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.[128] Again, it simply draws attention to the normative framework in use and highlights the disparity in remedial outcome, were a 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 done by scholars such as Walker and Gray[129] tentatively demonstrating how it might be possible to meet the elements required to establish a fiduciary relationship owed by governments to specific claimants, centred around the economic and employment interests of claimants under the relevant legislation[130] or by applying Mason J's well known dictum from *Hospital Products v USSC*[131]. The latter purports to identify the "essence" of a fiduciary relationship according to the presence of the following elements, which Walker argues are

---

[124] Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme (June 2009), 15.4.

[125] Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) [7.83].

[126] s28(a) *Audit Act* 1902 (NSW), discussed in S Brennan and Z Craven " "Eventually they get it all …" Government Management of Aboriginal Trust Money in New South Wales" [2007] UNSWLRS 4, 53. See also Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) [4.26], following a submission of the Indigenous Law Centre, UNSW Law Australia.

[127] s38(1) *Audit Act* 1902 (NSW), S Brennan and Z Craven " "Eventually they get it all …" Government Management of Aboriginal Trust Money in New South Wales" [2007] UNSWLRS 4, 53. See also Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) [4.26], following a submission of the Indigenous Law Centre, UNSW Law Australia.

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

[129] 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 *Melbourne University Law Review* 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.

[130] S Gray "Holding the Government to Account: The 'Stolen Wages' Issue, Fiduciary Duty and Trust Law." (2008) 32 *Melbourne University Law Review* 115, 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.

[131] (1984) 156 CLR 41, 96.

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.[132] Nonetheless, the history of litigation shows a poor record of success in demonstrating 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."[133] In relation to the 'no conflict rule', the obligation of the fiduciary in not limited to those in which there is an actual conflict, in which the fiduciary prefers personal interest or has taken actual advantage. Rather, the duty is broader and '…includes situations involving a *potential* for personal interest to be preferred or a *potential* for breach of duty to one principal where conflicting duties are owed to different principals.'[134] Equity's prohibition is against the fiduciary merely placing themselves in a position of conflicting[135] duty and duty or duty and interest, unless of course there is a full disclosure of material facts and informed consent to the breach is obtained from the principal.[136] Assuming that the scope of 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 and taken out of the trust for any purpose other than trust purposes into government hands, likely into consolidated revenue, there is a breach of fiduciary duty. Such a transfer or application of funds is vulnerable to return via the personal remedy of account of profits.[137] 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, thus justifying an order requiring disgorgement of that gain.

Loss-based remedies are also possible. Important work has clarified the crucial distinction between the situation where a money award (substitutive compensation) is paid to enforce the defendant's primary duty and that (reparative compensation) in which it is paid to make good a loss caused by the defendant's breach.[138] The loss analysis takes on particular significance in the context of a claim grounded in breach of trust. Wages were held for apprentices pursuant to trusts established under the *Aborigines Protection Act* 1909 (NSW), to be used "…towards the

---

[132] RJ Walker "Resolving the stolen wages claim in Queensland: The trustee's non-fiduciary duties"(2008) 2 *J Eq* 77, 96-99.

[133] *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).

[134] *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)

[135] 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).

[136] *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).

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

[138] 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 Publishing, 2012) 143-168; C Mitchell "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 CLP 307.

maintenance, advancement, education or benefit of …[a]… ward or ex-ward". Payments out which were not authorised, irrespective to whom, were thus in breach of trust. In this respect, any claim for compensation is substitutive: it is a direction to the trustee to perform this obligation. The remedy is addressed to the duty of the trustee to restore the value of an asset dissipated without authority.[139] The same obligation to pay substitutive compensation in enforcing the primary obligation of the defalcating party arguably also applies to custodial fiduciaries,[140] and to this extent would capture the same breach by the government in respect of funds held pursuant to any fiduciary obligation constructed on the foundation of 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 returned. The obligation is rather to restore the fund to the position before breach, before payment out. 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.[141] Thus a common sense tests of causation, qualified where relevant by 'but for reasoning' and possible appreciation of the role of any intervening acts, is irrelevant.[142] An award of substitutive compensation may therefore capture the value in the account if that could be established by evidence.

A claim for restitution may also be possible. There is a large road block in the way of any such claim, in addition to the obvious evidential obstacles, which is limitation. Although arguments may be made attempting to bring a claim in mistake[143] in respect of events long buried by time,[144] the cause of action for mistake will not systematically apply to many stolen wages claims. Time in most limitation statutes[145] runs from when the mistake was with reasonable diligence 'discoverable' and thus in those jurisdictions which adhere to the declaratory theory of law time runs in respect of mistake of law when it is declared by a later judicial decision.

The elements of an action for restitution are usefully satisfied on answering the following generic questions establishing the presence of unjust enrichment:[146] (a) the defendant must be enriched;

---

[139] *Re Dawson* [1966] 2 NSWR 211, 215; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277 (Spigelman CJ with whom Priestley JA and Meagher JA agreed); *Re BigTinCan Ltd v Ramsay* [2013] NSWSC 1248 [93] (Ball J); *Agricultural Land Management Ltd v Jackson* [No 2] [2014] WASC 102 [333]-[359], [368]-[375] (Edelman J).

[140] *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277 (Spigelman CJ with whom Priestley JA and Meagher JA agreed).

[141] See J Glister "Equitable Compensation" in J Glister and P Ridge (eds) *Fault Lines in Equity* (Hart Publishing, 2012) 143-168, 144-147.

[142] *Maguire v Makaronis* (1997) 188 CLR 449, 468

[143] *David Securities v Commonwealth Bank of Australia* ((1992) 175 CLR 353.

[144] *Torrens Aloha*; *Kleinwort Benson v Lincoln.* 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.

[145] *Limitation Act* 1969 (NSW) s56 (1): "…the time which elapses after a limitation period fixed by or under this Act for the cause of action commences to run and before the date on which a person having (either solely or with other persons) the cause of action first discovers, or may with reasonable diligence discover, the mistake …"

[146] At least in Australia following *AFSIL v Hills Industries* [2014] HCA 14 [14] (Hayne, Crennan, Bell, Kiefel and Keane JJ) where it has again been reaffirmed that 'unjust enrichment does not provide 'a sufficient premise for direct application in a particular case', these are to be understood as broad enquiries. Nonetheless, these are useful organising principles which operate at a high level of generality and, as carefully pointed out in *Lamson (Australia) Pty Ltd v Forstescue Metals Group Ltd [No 3]* [2014] WASC 162,[51] (Edelman J) "…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." 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*, were part of unjust enrichment. Deane J stated (256-57) that unjust enrichment is: "a unifying legal concept which explains why the law recognizes, in a variety of distinct

(b) the enrichment must be at the expense of the plaintiff; and (c) the enrichment must be unjust. The benefit in question 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 an 'incontrovertible' benefit; had an apprentice not been engaged, someone else would have been.[147] 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. Whether the restitutionary claim is against the original employer (in the cases of wages not collected and paid into trust in the first place) or the government (in the case of wages not paid out to the apprentice) there has been a failure of basis. Basis in this sense is a "failure to sustain itself as the state of affairs contemplated …" for the transfer of value.[148] Whilst it may be a fiction to speak of these arrangements being in any true sense voluntary, there can nonetheless be mounted an argument that the basis has failed.

Alternatively the unjust factor or "qualifying or vitiating factor"[149] might be identified as duress. For this pressure to ground restitution, there are two elements. The pressure must be illegitimate pressure and it must have caused the plaintiff to have conferred the benefit.[150] In relation to this classification as "illegitimate" the difficulty is that the policies of forced removals, placing into compulsory apprenticeship and control of money were according to law. There is a nascent doctrine of lawful act duress[151] under which despite the defendant's conduct being lawful, it may suffice as illegitimate pressure for the purposes of a restitutionary claim. However, any such argument would be tenuous at best. The welfare and historically paternalistic context of the Board's operations may arguably mitigate against a finding that "…there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports."[152] Individual litigants may however be able to establish evidence of actual, illegal duress to the person. The Senate Committee heard evidence of "horrific physical abuses of Indigenous workers" such as that of a youth who while living at Kinchella Boys Home in NSW would be sent out to work on local farms.[153]

---

categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case."

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

[148] *Roxborough v Rothmans* (2001) 208 CLR 516.

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

[150] *Crescendo Management v Westpac* (1988) 19 NSWLR 40, 45-46 (McHugh JA). It is possible to include a third element, namely the plaintiff had no reasonable alternative to giving in to the threat. One way of viewing this third requirement is to view a lack of reasonable alternative as objective evidence of the impact of the illegitimate pressure.

[151] *Australia and New Zealand Banking Group v Karam* [2005] 64 NSWLR 149 limits duress to threatened or actual unlawful conduct, a position endorsed in *Mitchell v Pacific Dawn* [2006] QSC 198, [20]-[25] (Chesterman J) and *Commercial Base Pty Ltd v Watson* [2013] VSC 334, [34]-[35] (Almond J). However, see *Westpac Bank v Cockerill* (1998) 152 ALR 267. Further, in *A v N* [2012] NSWSC 354 [509] (Ward J) "Moreover, even if *Karam* is incorrect is limiting duress to unlawful acts, the cases show that there is a high threshold to be met with respect to the conduct of the party alleged to be exerting pressure". In *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASC 36 [25] (McLure P) observed in relation to economic duress: "…if the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports." Newnes JA agreed with McLure P. See also *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). Despite these cases all being about money benefits, there is no reason in logic or normative justification why the same claim should not also be available for services.

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

[153] Australian Senate Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (December 2006) [5.19] ff. "If you made a mistake you were punished and most of the time you were flogged.

The measure of relief in restitution is presumptively the market value of the service at the time it was rendered,[154] which in very many cases would yield rates of recovery well above those currently being offered under reparations arrangements. 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 over current administrative arrangements are that their availability is not limited by to claiming funds administered by the government up until 1969, and the question whether or not funds were actually paid into those account sin the first place is completely irrelevant.

IV. PRIVATE LAW LESSONS FOR REPARATION

Looking past what private law *cannot* do, we should learn from what it *can* do. 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 set about responding to them remedially. We argue that these lessons should be transferred into the (re)design of reparations schemes, both existing and future.

Again, lest we are misunderstood, we stress that we do *not* advocate that recourse to private litigation is the best solution for victims to pursue, although it should always remain an option open to them and private law rules and doctrines could no doubt be improved. Rather, we suggest that the design of schemes that purport to redress grave historic injustice should learn from that which private law has to tell us. The ideas that can constructively be taken on board are lessons about justice that appear to have been forgotten in the current pragmatic rush to political compromise. We divide them below into lessons that flow 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,[155] but one thing on which most writers agree is that the norms of corrective justice are

---

They'd strip you off and line you up in front of all the boys and each kid had to belt you. If the kid didn't belt you then he would have to get belted. If the other kids didn't hit you hard enough to satisfy the managers they were sent down the line to get a flogging too. By the time you got to the end you were black and blue and bleeding all over. There was one incident I was involved in with cementing the laundry and someone put their footprint in the concrete. When the manager saw this he went crazy and lined all the boys up to ask who put their footprint there. He made us all place our foot over the print. Half a dozen boys would have fitted it but he blamed me so I was send down the line and belted. He stripped me off and started belted me with a cane; all over my body. All I could do was cover my face up and my genitals. Later on it was discovered that it was the manager's son that had made the footprint in the wet cement."

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

[155] For one particularly influential source, see Weinrib, above, n1. A very incomplete list of other contributions includes: Kronman, 'Contract Law and Distributive Justice' (1980) 89 YLJ 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 LR* 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 Law 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 and Philosophy* 1.

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 restoration makes wrongdoers morally and legally accountable to victims; it responds to violations of bilateral relationships of right and duty between them; it ignores the past (or current) needs 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 particular distributive effects, or create incentives for perpetrators to change their behaviour, but these are 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 and the like), in which political compromises between different groups, social priorities and available social resources are constantly struck and regularly 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 the wrongs of an employee is clearly an exception on all but the most strained analyses and 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. It is nonetheless impossible to understand the enterprise in which private law is engaged without reference to corrective justice norms. Such norms have a credible claim to underpin significant doctrines and remedies historically, including the generous monetary damages awards made in cases of negligence and trespass to the person; breach of fiduciary duty and unjust enrichment law. Political interventions into the substance of the common law do sometimes occur (indeed these days are increasingly frequent), but 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 (at least formally) insulated from wider 'political' processes. These could indeed be seen to be some of its strengths.

One of the implications of corrective justice for the reparation of grave historic injustice that we have suggested is that awards should be significantly higher than they currently are, 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) and assessors should have access to (but not be bound by) legal precedents in determining the monetary sums appropriate to a particular case. It is also not good enough simply for those implicated in injustice to undertake to provide discretionary assistance such as counselling on an on-going basis, so as to remove control from victims over aspects of their future provision and care. Not only is the sentiment of *ex gratia* payment inappropriate, given the violations of personal entitlements that have taken place, but the norm pressing for provision is more than a matter of discretion. It is one of duty and right. It is also highly anomalous in principle from a corrective justice point of view that the current NSW scheme in respect of stolen wages does not cover 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.

The norms of corrective justice also suggest that reparations awards should 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, even they express a readiness to make such exceptions. Such exceptions are especially important in cases of abuse, where victims may simply not be psychologically up to meeting the arbitrary deadlines of bureaucrats. Whilst it is therefore understandable that the DART scheme should be designed in such a way as to try to deal with all of these issues in one quick, fell swoop, 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. The systems must be available longer-term.

The implications of corrective justice norms on 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. Were current civil standards of proof to be imported into reparations schemes, this would clearly operate to the detriment of victims and one of the features of the DART scheme that is most attractive is its readiness to drop the evidential standard to one of mere plausibility. It may be that the relatively low 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 clearly 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 must be acknowledged that we have not (yet) been able to dig deeper into DART decision making data. Although the standard required is mere plausibility, further examination may reveal that the standard in fact reached by claimants was a higher standard. The other factor which cannot be ignored in the DART context, which is of relevance in determining the standard to be applied, is the context in which these complaints occur. One might argue there is a lower risk of unreliability (in the sense of false complaint) because of the institutional setting and the risk of a career ending complaint.

B. Lessons about Institutional Integrity and Process

Private law is not just a system of corrective justice. It is also, more broadly, a system of law attended by features of institutional integrity. These features include independence, transparency, mechanisms for treating like cases alike, and reviewability. Each of these features is powerfully legitimising and indeed collectively they explain why people might prefer judicial solutions to existing extra-legal ones, were it not for the expense and delay entailed by recourse to law. We suggest that these features should be more strongly incorporated into extra-legal reparations schemes.

The first commitment to independence is crucial. Independence is not simply a matter of 'private purity', but public appearance, which does not seem to be clearly understood in *Towards Healing* or the *Melbourne Process*. However independent-minded and fair those are the individuals determining claims, it is simply inappropriate for them to be appointed by institutions implicated in the relevant injustices. Formal independence does not simply provide greater assurance of equity, but inspires public confidence in the system and helps in the vindication of victims'

claims. An independent adjudicator appointed by the State, such as a former judicial officer, would be a good solution in many cases. Funding for the post could also be state-provided, but as long as the appointment itself is independent, there are good arguments from the corrective justice point of view for recovering the costs of the assessment from the institution accepting responsibility for the abuse.

As regards transparency, we suggest that the processes of reasoning according to which reparations payments are determined should be made more open through the publication of awards in all cases (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 potentially also be improved by allowing assessors access to a legal precedents. Finally, determinations should be subject to independent review, most probably through a formal, slimmed-down appeal process. 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 the *Towards Healing* Process, where the semblance of partiality is strong.

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, on the basis that, in many cases, 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 normally be expected to 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 and arrangements 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, in fact, 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, strictly speaking, be established, all of the institutions in question have accepted institutional responsibility for the injustices perpetrated - both by apologising and indeed by entering into private reparations schemes with a view to doing 'justice'. Having undertaken to do so and to respond to an acknowledged wrong, they should 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 be 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 between limited public resources and a vast range of competing demands. But the sorts of 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, we suggest, 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 they 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. No useful messages have been allowed to pass from the private into the public domain and many have been ignored. It is hard to determine the precise reasons for this. Perhaps we have thought too much about what private law cannot do (there is much of this), to the exclusion of what it can. In this article we have argued that private law doctrines and remedies in fact provide a rich normative resource upon which to draw in designing private 'reparation' 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. We have also made some practical suggestion as to features of those schemes that ought to be changed in order to do a great measure of 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.