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## Designing Reparation: Lessons from Private Law

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### I. Introduction

This chapter is concerned with reparations schemes in domestic law which are intended to repair grave historical injustice. Recent examples include the Defence Abuse Reparations Scheme (DART) established to deal with institutionalised abuse within the Australian Defence Force (ADF)<sup>3</sup> and the model of redress proposed by the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission Model'),<sup>4</sup> discussed here with particular reference to clergy abuse in the Australian Catholic Church. We argue that such schemes – precisely because they are being proffered by the institutions bearing moral and legal responsibility for the wrongs done – ought more closely to map the ethical commitments and remedial lessons of private law.<sup>5</sup> Although private law

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3 Australian Government, *Defence Abuse Response Taskforce: Amended Terms of Reference* (November 2015), [www.defenceabusetaskforce.gov.au/Aboutus/Documents/Amended-Terms-of-Reference.pdf](http://www.defenceabusetaskforce.gov.au/Aboutus/Documents/Amended-Terms-of-Reference.pdf) ('DART Terms of Reference'). DART comprises reparations payments, restorative engagement and an extensive counselling program.

4 Set out in Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) ('2015 Report').

5 See generally S Degeling and K Barker, 'Private Law and Grave Historical Injustice: The Role of the Common Law' (2015) 41 *Monash University Law Review* 377–413.

claims through the courts have often failed for technical or evidential reasons,<sup>6</sup> this failure should not, we say, be permitted to obscure the fact that private law has a distinctive and particularly powerful normative approach to remedying injustice, which is backed by procedural systems that are transparent, relatively consistent and respectful of individual rights and dignity. Private law has a centuries-old tradition of understanding the types of injustice involved and of appropriate ways of remedying them, and its norms can usefully be brought to bear on domestic reparations system design. One of the most important norms informing private law in this arena, which we argue ought to be permitted more fully to animate reparations design, is the norm of corrective justice.

## II. Corrective Justice

There is, we accept, no single conception of corrective justice. The canon is voluminous and we do not attempt to traverse distinctions and differences here.<sup>7</sup> However, it may fairly safely be asserted that corrective justice is distinct from distributive justice and that it has certain, basic, precepts. Corrective justice assumes a bilateral relationship of right and duty between victim and wrongdoer which has been infringed by the wrongdoer. Corrective justice is then done by requiring the wrongdoer to restore the victim as closely as possible to the position he or she would have been in, had the injustice not been done. In doing this, the needs (past and current), relative resources and character of the parties are ignored. In contrast to distributive justice, which contemplates broader political,

6 For example, limitation of action or want of a proper defendant to sue. See, for example, *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

7 See generally: Peter Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) 77 *Iowa Law Review* 515; Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992); Jules L Coleman, 'The Practice of Corrective Justice' (1995) 37 *Arizona Law Review* 15; John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 *Law & Philosophy* 1; Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason W Neyers, Mitchell McInnes and Stephen G A Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004) 111; Dennis Klimchuk, 'On the Autonomy of Corrective Justice' (2003) 23 *Oxford Journal of Legal Studies* 49; Anthony T Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472; Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115; Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest J Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theoretical Inquiries in Law* 1; Ernest J Weinrib, 'The Normative Structure of Unjust Enrichment' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing, 2008) 21; Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012); Richard W Wright, 'Right, Justice and Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon, 1997) 159; Richard W Wright, 'Substantive Corrective Justice' (1992) 77 *Iowa Law Review* 625.

social or economic ends and which often distributes resources to victims by reference to criteria of immediate need, the purposes of monetary awards in corrective justice are simply to protect prior rights and restore the parties, as best as can be done, to their original normative positions. Corrective justice is thus wholly backward-looking and fundamentally concerned with eradicating the ills of the past, accepting, of course, that one cannot literally turn back time. When corrective justice is implemented, this may have beneficial side-effects which are distributive, or which create incentives for wrongdoers to alter their future conduct, but such impacts are not the point of doing corrective justice, merely its incidental side-effects. These do not derogate from the fundamentally restorative character of the law's aims, institutions and remedies. Since a corrective justice system must be administered by public courts with legitimating authority, this in turn requires the system that supports corrective justice and its results to be open, accountable, appealable and consistent in its treatment of victims.

The balance of this chapter briefly examines selected aspects of the DART and the Royal Commission Model in the light of private law's ethical commitments as a system of corrective justice, and makes suggestions as to how these schemes may be improved. It is important to remember that, in both instances, institutional responsibility for the relevant abuses is accepted, or is assumed within the terms of the scheme to have been accepted. In relation to abuses in the ADF (as with those in the Catholic Church),<sup>8</sup> public apologies have hence been made by institutional representatives at the highest level.<sup>9</sup> Similarly, in the Royal Commission Model, a person is only eligible for redress if 'he or she was sexually abused

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8 See, for example, Pope Francis, 'Address to Members of the International Catholic Child Bureau' (Speech delivered on 11 April 2014), [w2.vatican.va/content/francesco/en/speeches/2014/april/documents/papa-francesco\\_20140411\\_ufficio-cattolico-infanzia.html](http://w2.vatican.va/content/francesco/en/speeches/2014/april/documents/papa-francesco_20140411_ufficio-cattolico-infanzia.html); Homily of Pope Francis, Holy Mass in the Chapel of the Domus Sanctae Marthae with a Group of Clergy Sex Abuse Victims, 7 July 2014, [w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco\\_20140707\\_omelia-vittime-abusi.html](http://w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco_20140707_omelia-vittime-abusi.html).

9 Department of Defence (Cth), Statement from General David Hurley, Chief of the Defence Force, 26 November 2012; 'Abuse in Defence' Commonwealth Parliamentary Debates, House of Representatives, 26 November 2012, 13105 (Defence Minister Stephen Smith). See, for example: 'Young men and women have endured sexual, physical or mental abuse from their colleagues, which is not acceptable and does not reflect the values of a modern, diverse, tolerant Australian society ... *Acknowledging the past and taking responsibility for it* is only the first step' (Smith, emphasis added).

as a child in an institutional context',<sup>10</sup> which (according to definitions of Recommendation 45) broadly encompasses situations in which an institution is directly or indirectly responsible for the harm.<sup>11</sup>

While we acknowledge that any general assumption of responsibility for the harm is conceptually distinct from a particular victim demonstrating that an institution has infringed his or her rights to the standards normally demanded in a court of law in a private law action (such as a negligence action), this does not, we argue, derogate from the moral force of responsibility having been accepted and from the possibility of more meaningful repair.<sup>12</sup> Despite the fact that some of the traditional requirements of private law actions may not have been demonstrated, it is still valid to characterise the infringement of personal rights which has taken place as a violation of duty and right and to look upon the development of remedial solutions in that light. Both DART and the Royal Commission Model implement a system of payment which, although directed to recognising the suffering of the victim, abandon the commitment to protecting prior entitlements.<sup>13</sup> Contrary to this position, we argue that the norm calling for reparation is not one that is satisfied by discretionary distribution, but one which is founded in the original right–duty relationship between victim and wrongdoer, and which demands the doing of corrective justice when that relationship is violated. Although both schemes are careful to make clear that reparation payments do not of themselves discharge any legal liability,<sup>14</sup> it must be the case that payment under either scheme, which itself rests in part on the funding of that scheme by the implicated institutions,<sup>15</sup> is in substitution for

10 2015 Report, Recommendation 43.

11 Ibid. Recommendation 45.

12 Note that while even private law does not assume that the making of a mere apology amounts to an acceptance of legal liability, the apologies that have been made here are of a different order, accepting *responsibility* for the wrong even while denying legal liability.

13 2015 Report, Recommendation 15; DART, *Second Interim Report to the Attorney-General and Minister for Defence* (2013) ('DART Second Report'), Appendix M: 1.5, 1.6 and 2.1.

14 The 2015 Report at page 389 discusses redress as providing an alternative not an addition to civil litigation and in Recommendations 63–65 suggests that as a condition of making a payment a redress scheme should *require* an applicant to release the institution and any government from further liability for institutional child sexual abuse. DART Second Report, Appendix M, 1.6.2, expressly confirms payment does *not affect* any rights of the applicant. Nonetheless, the assumption of both is that mere payment does not discharge liability and conversely (and perversely) that of itself payment *may suggest* some institutional responsibility for the harm.

15 2015 Report, 31–32 and Recommendation 35; DART is funded by the Department of Defence. See, for example, DART, *Seventh Interim Report to the Attorney-General and Minister for Defence* (September 2014) ('DART Seventh Report') 30.

moral obligations generated by wrongdoing. Accepting responsibility for wrongdoing, in our view, means accepting responsibility to do corrective justice, or at least doing something that more approximates corrective justice than distributive schemes of welfare-provision. Accepting responsibility may not mean accepting legal liability, but it still means accepting the responsibility to do corrective justice.

Informed by this norm, reparations schemes should more particularly reflect the circumstances of each victim. Amounts available should be increased to acknowledge the physical, mental, economic and emotional interests infringed, as well as the delay that has been involved in making compensation available. Similarly, the financial caps proposed on reparation amounts could be revised upward, even if they do not reach precisely the same level as would be awarded by a court of law. While we appreciate that neither scheme is intended to effect full compensation,<sup>16</sup> and as such is not a direct analogue for a claim pursued via private law mechanisms in which the individual circumstances of the plaintiff are considered, awards under both DART and the Royal Commission Model could, and should, be more highly individuated out of respect for the personal dignity of every individual involved. Instead, however, DART adopts a stepped approach calibrated to the severity of the abuse, with a fixed award at each step<sup>17</sup> and general factors to guide the decision maker in determining entitlement and level of payment.<sup>18</sup> Similarly, the Royal Commission Model suggests a three-step scale of payment<sup>19</sup> to be assessed and determined by a matrix of the level of abuse, impact of abuse, and additional elements.<sup>20</sup> Neither of these schemes appears to compensate for lost earnings (which conceivably could be a very substantial loss), although it is difficult to tell because the administrative apparatus does not ask about the losses suffered by the particular victim. Instead the schemes focus on the particular events or incidents giving rise to the complaint. In other words, reparation is given for ‘abuse’ and its broad brush impact; there is no inquiry into loss.

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16 2015 Report, 220–25; DART Second Report, Appendix M: 1.6.1.

17 DART Second Report, Appendix M: 4.6.

18 DART, *Fourth Interim Report to the Attorney-General and Minister for Defence* (2013) 9 (‘Fourth Report’).

19 2015 Report, Recommendation 19.

20 *Ibid.* Recommendations 16 and 17.

Procedural aspects of both schemes also merit consideration. Outcomes and reasons for decisions in relation to individual applicants (suitably anonymised) under DART and the Royal Commission Model have not been (DART) and appear not to be intended to be provided (Royal Commission Model). Apart from the obvious point that greater legitimacy and consistency might be achieved via greater transparency, there is a related point which concerns the right to appeal. The making, or not, of a payment under DART is final and cannot be appealed.<sup>21</sup> The Royal Commission Model specifically contemplates the need for appeal rights, described as ‘an internal review process’<sup>22</sup> which, to the extent that the redress scheme is ‘established on an administrative basis, should be made subject to oversight by the relevant ombudsman through the ombudsman’s complaint mechanism’.<sup>23</sup> In creating an appeal mechanism, we similarly suggest that the lessons of private law be permitted to infuse the drafting process. Appeals should be available on the merits of a particular award, informed, where relevant, by publicly-available, parallel decisions.

The running of time must also be accommodated. Neither scheme contemplates a permanent system of reparation. Indeed, DART is soon to close<sup>24</sup> and the Royal Commission Model envisages a filing deadline and a scheme of finite duration.<sup>25</sup> While we acknowledge the desire for financial certainty on the part of governments and institutions, and the efforts being made to effect institutional change such that historic patterns of abuse are not repeated, the inflexibility of the current system seems unfair. Admittedly, DART has already been extended beyond its initial life.<sup>26</sup> However, the experience of judges awarding damages in parallel cases is that those who suffer psychiatric illness or impairment, itself the product of abuse, may perversely be unable to appreciate their own interest in bringing a claim, and thus delay. In these circumstances,

21 DART Second Report, Appendix N. Note, however, in DART Seventh report, 12, there is a procedure for Reconsideration of Decisions ‘in reviewing matters previously assessed as out of scope or not plausible on receipt of requests for reconsideration from complainants’.

22 2015 Report, Recommendation 61.

23 *Ibid.* Recommendation 62.

24 Similarly, DART-funded counselling will not be available after 30 June 2016 and the last date to be referred to counselling is 31 March 2016: Defence Abuse Counselling Program Factsheet ([www.defenceabusetaskforce.gov.au/Outcomes/Pages/DefenceAbuseCounsellingProgram.aspx](http://www.defenceabusetaskforce.gov.au/Outcomes/Pages/DefenceAbuseCounsellingProgram.aspx)) (accessed 26 February 2016). Similarly it is hoped that the restorative engagement program will conclude by 31 March 2016. See DART Terms of Reference (n 3).

25 2015 Report, Recommendations 46 and 48.

26 Initially required filing by 31 May 2013. Subsequently amended to allow ‘complaints from women who experienced sexual abuse at ADFA during the period 1991 and 1998 and registered ... by 30 September 2015’. DART Terms of Reference (n 3).

a more permanent and perhaps comprehensive scheme could be established, with the capacity to extend filing deadlines in the same manner as all courts applying limitations statutes. Additionally, we note the Royal Commission Model's advice<sup>27</sup> suggesting removal of limitation periods applying to claims for damages brought by a person, where that claim is founded on personal injury resulting from sexual abuse of that person in an institution when the person is, or was, a child. While this reform to limitation periods in civil litigation may well be a welcome innovation, it also demonstrates the need for some discretion in applying filing deadlines in the reparations mechanism. Equally, we query whether all potential applicants for reparation who fail to file before the deadline will necessarily succeed in litigation (even with an extension of limitation) given the other barriers to success, such as the death of witnesses etc.

Finally, mention must be made of the standard of proof to be applied. DART requires an applicant to demonstrate 'mere plausibility'.<sup>28</sup> The Royal Commission Model proposes 'reasonable likelihood',<sup>29</sup> which is lower than the common law standard of proof. In doing so, the Commission makes the point that it remains:

sceptical of whether schemes that purport to apply higher standards ... really do [so] ... or if they have any real meaning or any work to do in determining applications where there is no 'witness' other than the applicant and no other 'evidence' against which ... [allegations of abuse] ... can be balanced.<sup>30</sup>

The Commission also noted that its proposed payment levels exceeded those in DART<sup>31</sup> and that, commensurate with this higher level of payment, oral hearings may be required in addition to documentary evidence.<sup>32</sup>

There is obviously a trade-off in the design of both systems in that, at least compared to civil litigation, the amounts available are less, but so is the burden of proof to be met. Notwithstanding this, the Royal Commission Model also requires applicants to release institutions and governments from any civil liability, whereas in DART the right to

27 2015 Report, Recommendations 85–88.

28 DART Second Report, Appendix M: 4.5.

29 2015 Report, Recommendation 57.

30 2015 Report, 371.

31 Ibid. 376.

32 Ibid. 363 and Recommendations 51–55.

seek damages in addition is expressly preserved. Given, however, that the decisions of neither system are public, it is simply not possible to know whether or not a higher standard of proof has in any particular case been met (or, in egregious cases of abuse, perhaps conceded). In such instances, it should be open to the decision-maker, we suggest, to award higher amounts than currently proposed, assuming that impacts on the particular circumstances of that victim may be demonstrated.

### III. Conclusion

It is possible our parliaments will increasingly have to draft statutes implementing systems of reparation. This discussion has briefly touched on two examples of contemporary relevance, but there are many others. We only have to search the records of parliamentary debate to identify apologies given for past decisions leading to injustice for which civilised societies now express regret and may seek to make redress.<sup>33</sup> The message we have is that, in designing reparation systems, we should not forget that these injustices attract our attention precisely because they infringe our notions of moral right and duty. The norms of corrective justice remind us that the claimant seeks redress as a matter of prior entitlement from institutions which have acknowledged moral responsibility for the wrongdoing in question, even if this has stopped short of conceding legal liability. Reparation in these cases is not, and should not be, drafted along distributive lines that merely seek to meet the most immediate needs of victims, or which compromise their original rights for other social policy objectives.

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33 For example: United Kingdom, Parliamentary Debates, House of Commons, 24 February 2010, Vol 506, col 301 (Gordon Brown, Prime Minister) (forced child migration); and Julia Gillard, 'National Apology for Forced Adoptions' (Speech delivered at the Great Hall of Parliament House, Canberra, 21 March 2013) (forced adoption).

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