



Criminalising Institutional Failures to Prevent, Identify or React to Child Sexual Abuse

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Abstract

Although there is increasing academic recognition of corporations as criminogenic, the criminal legal system has demonstrated difficulties in conceptualising corporate culpability. The current Royal Commission into Institutional Responses to Child Sexual Abuse provides ample evidence of why organisations can and should be criminalised for systemic failures. I demonstrate that the emphasis upon individualistic subjective culpability by the criminal legal system does not adequately encapsulate the institutional failings detailed before the Royal Commission. Whilst mandatory reporting offences are important, these offences do not adequately respond to the kinds of organisational failings identified by the Royal Commission. I argue in favour of developing a new institutional offence constructed upon realist concepts of negligence and/or corporate culture that recognises that organisations are capable of wrongdoing and sufficiently blameworthy to justify the imposition of criminal sanctions. I conclude by arguing that the expressive role of criminal law justifies and requires the criminalisation of this kind of organisational wrongdoing.

Keywords

Systemic failure; corporate culture; negligence; institutional child sexual abuse.

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Introduction

The ongoing Australian Royal Commission into Institutional Responses Child Sexual Abuse (Royal Commission) proffers an opportunity to reform criminal legal system responses to harms caused by or within organisations. The focus of the Royal Commission has demonstrated the significance of institutional failures to prevent and/or adequately respond to child sexual abuse. There is a disjunction between the condemnation of organisations articulated by the Royal Commission and the criminal legal response. There has, in fact, been no criminal justice response whatsoever to *organisational* failures to prevent child sexual abuse within institutions caring for children. This mirrors concerns articulated generally in academic literature about the disjunction between the social and moral condemnation of organisations and the legal position of these organisations (Colvin 1995). A key obstacle militating against criminalising organisations is the difficulty of conceptualising organisational fault due to the dominance of individualistic subjective culpability in criminal legal attributions of blameworthiness. This article explores the ways in which the criminal legal system's emphasis upon individualistic subjective fault is inadequate in its response to organisational failures and explores the ways in which organisations should have some criminal liability for the creation, management and response to risk when it has materialised in harm to a child. This article endorses the creation of a new offence criminalising institutional child sexual abuse built around the concept of failure.

The Royal Commission into Institutional Responses to Child Sexual Abuse commenced in 2013 and has been extended to continue until the end of 2017.² At the time of writing, the Royal Commission had completed its last of 57 public hearings, and held more than 6,600 private sessions with victim/survivors of child sexual abuse, with more than 1,800 people awaiting private sessions. The formal public hearings examine evidence about child sexual abuse and how institutions have (not) responded to allegations of abuse. The public hearings are open to the general public and are also telecast live on the web, the transcripts are available on the website and the findings are then presented in Reports. The Royal Commission has considered child sexual abuse in a wide range of institutions including schools, after-school care, religious organisations, the Australian Defence Force, the entertainment industry, sporting clubs, and health care providers. The Royal Commission has provided an extraordinary amount of detail about systemic failure and its impacts upon child sex offending and reactions by the institution, and highlights the need to hold organisations criminally responsible for these failures. It is part of a series of public inquiries that have occurred internationally into institutional child abuse (Daly 2014; Swain 2014).³ The Royal Commission, like the other public inquiries, offers an opportunity for legislators to address the unsatisfactory criminal justice response to institutional child sexual abuse. This potential can be situated as part of the criminal legal system's response (or lack thereof) to organisational or corporate malfeasance. Reforms in relation to corporate crime have often been motivated by particular events. For example, the corporate manslaughter reforms in the United Kingdom were motivated by unsuccessful prosecutions in response to the deaths of 193 people on the *Herald of Free Enterprise* in 1987 and the Southall rail crash in September 1997.⁴ Accordingly, the current Royal Commission could act as a catalyst for reforms to criminal legal system responses to institutional wrongdoing.

Corporate criminal responsibility 'is often tolerated rather than encouraged' (Wells 2014). Corporate criminal law has emerged on a case-by-case and, more recently, a statute-by-statute basis with a consequent lack of general principles (with a notable exception of the Australian Model Criminal Code—*Criminal Code Act 1995* (Cth)—discussed below). There is a wealth of excellent literature about the difficulties the criminal legal system has in grappling with corporate responsibility (Fisse and Braithwaite 1993; Gilchrist 2012-2013; Gunningham 1987; Wells, 2014). In particular, the general principles of criminal law were constructed based primarily upon individual responsibility, and this has meant that the criminal legal system has had difficulties in responding to the developing dominance of business corporations (Wells 2014). A complicating factor in conceptualising organisational liability is that many of the institutions

involved are not regarded as corporations at law and thus evade corporate liability (Gleeson 2016). The Royal Commission has adopted a realist perspective with regard to institutions that are the subject of the inquiry, focusing on institutions and their failure to protect against and respond to child sexual abuse rather than definitions at corporate law which are designed, and have been used, to protect against institutional liability (Doyle and Rubino 2003-2004). This article reflects a similar approach. Whilst the bulk of academic research into organisational liability revolves around corporate law, this article adopts a broad definition and refers to 'organisations' throughout to include not only legal 'corporations' but also institutions, such as the Catholic Church, in constructions of organisational criminal liability. The focus of this article is upon the ways in which the criminal legal system's focus on individualistic fault is inadequate and the consequent need to construct collective models of fault that more accurately reflect and reinforce organisational responsibility.

The continuing discomfort with organisational liability has unfortunately been reflected in the recent proposals by the Royal Commission for criminal law reform in the *Consultation Paper: Criminal Justice* (the 'Consultation Paper') (Royal Commission 2016a). The central focus of the Royal Commission is in its title: '*... Institutional* [emphasis added] Responses to Child Sexual Abuse'. This is also emphasised by the Letters Patent which require the Commission to consider the role of institutions where child sexual abuse has occurred and their activities that have 'created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk' (Royal Commission 2014b: m(iv)). However, the Consultation Paper suggests that, despite the details in the Royal Commission case studies (numbering 57 at time of writing and henceforth referred to as 'the Reports'), the Royal Commission's focus has remained primarily on individual responsibility, specifically the criminalisation of child sexual abusers, and improving the response of the criminal justice system to individuals. This article does not suggest that these reforms are not important. But what is disappointing is the minimal amount of time that has been devoted to the conceptually challenging area of organisational or corporate liability. Of the almost 800-page Consultation Paper, only ten pages, or part of one of the 15 chapters, are focused on criminal justice responses to institutional failings. The bulk of analysis regarding organisational wrongdoing is actually in a separate report, *Sentencing for Child Sexual Abuse in Institutional Contexts* (the 'Sentencing Report') (Freiberg et al. 2015). Arguably, the capacity for the authors to focus on criminalising organisational wrongdoing was beyond the terms of the brief of the Sentencing Report as no organisations have been punished for collective wrongdoing. However, the authors justified their approach in a chapter titled 'Institutional Offending: The Limits of the Law': 'the power to sentence is contingent upon the conviction, or finding of guilt, of the perpetrator. Sentencing of offenders for child sexual abuse focuses on individuals rather than institutions or organisations' (Freiberg et al. 2015). Freiberg et al. go on to consider how institutions might be criminally prosecuted in relation to institutional child sexual abuse as a precursor to analysing potential for sentencing. The arguments detailed in the Sentencing Report are later referred to in the Consultation Paper.

The focus of this article is not upon the sex offender, but the institutions that failed to prevent and/or react to the abuse. I analyse proposed reforms in light of the details provided in selected Reports published on the Royal Commission website of public hearings of case studies. These Reports detail quotations and summaries of witness statements, relevant historic and current legislative and regulatory frameworks, and findings of and recommendations made by the Royal Commission. The evidence and findings of the Royal Commission demonstrate that an organisational model of culpability must be developed in order to adequately respond to institutional child sexual abuse. A key concern of this present article is that organisations are most likely to cause systemic harms, and yet the more complex an organisation, the less likely it is to be held criminally responsible (Crofts 2016; Veitch 2007). For the purposes of my analysis, I focus upon the *Report of Case Study Number 12: The Response of an Independent School in Perth to Concerns Raised about the Conduct of a Teacher between 1999 and 2009* (Report No. 12). Report

No. 12 (Royal Commission 2015b) analyses the response (or lack thereof) to concerns raised between 1999 and 2009 by several teachers and a parent about the behaviour of a male teacher, YJ, in the preparatory school towards a number of his students. The abuse was finally reported to police in September 2009 and YJ was charged and convicted of committing sexual offences against five students. All of the victims were pupils in one of YJ's classes at the time of the offending. I have selected Report No. 12 because it is sadly illustrative of the kinds of institutional failures detailed in all of the Royal Commission findings. Through this case study, I demonstrate some of the ways in which the individualistic focus of the criminal legal system does not adequately or accurately encapsulate the collective, institutional failings detailed by the Royal Commission.

The first two sections of this article focus on the ways that the individualistic bias in the criminal justice system construction of fault fails to grapple with organisational liability. This is apparent firstly in the continued individualistic bias in constructions of corporate liability generally, and secondly in the emphasis upon mandatory reporting offences in response to institutional child sexual abuse, neither of which adequately responds to the kinds of organisational failings detailed in the Royal Commission. In the following sections, I argue in favour of developing a new institutional offence constructed upon the concepts of negligence and/or corporate culture in accordance with a realist approach that recognises that organisations are capable of wrongdoing. I conclude by arguing that the expressive role of criminal law justifies and requires the criminalisation of this kind of organisational wrongdoing.

Individualistic bias in the criminal justice system and conceptions of organisational fault

Historically, the criminal legal system has struggled with ascribing responsibility to individuals within institutions who did not actually perpetrate a crime but could be described as 'third parties' responsible for the care of victims and/or perpetrators. The individualistic focus of the Consultation Paper reflects general principles of criminal law that have been developed and articulated primarily around individual responsibility. There are exceptions, such as the doctrine of complicity and conspiracy, but this 'group dimension' is characterised and regarded as exceptional. The individualistic focus of criminal law has been retained in the regulation of corporations. This has been demonstrated partly in the historic reluctance to criminalise organisations. Legal responses have been hampered by the idea that the corporation as a person was a fiction. For example:

I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has the hands to carry out his intentions. A corporation has none of these... (Lord Reid, *Tesco Supermarkets Ltd v Natrass* 1972 App Cas 153, 170).

One traditional argument against extending liability to corporations was that they lacked *mens rea*, thus raising the question of how they could be sufficiently at fault to justify criminalisation. This reflects the contemporary emphasis upon the necessity of subjective culpability for attributions of blameworthiness (Crofts 2013; Fletcher 1978). A classic response to this has been to create strict and absolute liability schemes that focus upon prohibited actions and/or the *harms* caused by organisations irrespective of *mens rea*. Such regulatory schemes have been adopted in the area of Occupational Health and Safety and environmental offences. Research suggests, however, that such regulatory offences are frequently not prosecuted in the absence of *mens rea* even though not required by the offences (Korsell 2010). A more recent approach is to develop an argument of corporate *fault* analogous to individual fault through concepts such as negligence and corporate culture (considered below). This approach asserts that organisations can and should be held responsible for creating an organisational environment that may be unsafe and therefore criminally dangerous. On this account, an organisation can and should be regarded as at fault for the *failure* to properly structure and co-ordinate its responsibility where

these systemic or cultural problems underpin harms. A second classic argument against the criminalisation of organisations was that traditional methods of punishment, in particular imprisonment, could not be applied to corporations as these methods were constructed around individuals rather than organisations (Coffee 1981; Colvin 1995). The issue of sanctions in response to organisational malfeasance remains challenging but jurisdictions have developed innovative sanctions that have included fines, remedial orders, orders for the advertisement of convictions, fines and the nature of offences, and suspended prosecutions (Clough and Mulhern 2002). These traditional arguments reflect and inform doubts as to whether or not it is appropriate to attribute criminal liability to organisations that cause harm but are not without their own internal shortcomings. The challenge remains to forge a coherent link between the general principles of criminal law and the realities of the corporate form, and this is not insurmountable.

This article pursues the key question of how to construct the fault of the organisation such that it is worthy of criminal sanction. Individual subjective culpability has framed the way in which corporate offences have been structured. Historic approaches for attributing blame to corporations were based on the assumption that corporate wrongdoing could only be derivative of individual wrongdoing. The agency or vicarious principle held a company liable for the wrongful acts of all its employees, providing they were acting within the scope of their employment or authority. A more specialised form of vicarious liability is identification liability, which holds a company liable only when a director or senior officer has acted with the requisite fault, expounded in *Tesco v Natrass* [1972] AC 153.⁵ Identification theory has been recognised as highly restrictive and not always appropriate. The ‘directing mind’ model distorts decision-making in large corporations; modern corporations divide authority in a myriad of ways which create more than one directing mind.⁶ This is demonstrated in the Royal Commission Reports; even the school in Report No. 12 (Royal Commission 2015b), which was not a particularly large or complex organisation, had a division of labour and knowledge.

The focus on individual personnel in the Royal Commission Reports does not adequately reflect the presence or absence of organisational fault. The problem that the Reports highlight is that it is not what the upper management knew or intended, but what they did not know or turn their mind to. In the bulk of the Reports, upper management failed to prioritise the safety of children and to develop and enforce appropriate child safety policies. The higher up in the corporate hierarchy, the less likely was a person to know of (suspected) grooming or child sex offending. The reporting procedures at the school in Report No. 12 militated against upper and middle management being aware of suspicions about the offending teacher. The school operated two separate personnel file systems —one at the preparatory school and the central file at the high school more than a kilometre away—and neither file system required a reference to the other. There was no centralised database to record concerns or complaints or to facilitate a comprehensive review of the files when a complaint was made. The separate systems meant that complaints were unlikely to be heard or seen by the headmaster of the Perth independent school, who was unaware of the complaints until the preparatory master reported them to him in 2004. The school council and Archbishop were not informed until 2009, and that was only upon the insistence of a parent. Upper management was broadly unaware of complaints and there was no system to link information.⁷ When the headmaster was finally informed of the teacher’s offending behaviour, the headmaster arranged a meeting with the offender, but the head of the preparatory school was not present. This meant that there was a lack of continuity and knowledge in response to the offending teacher. The headmaster relied only on the information that was recorded in the files.

Vicarious principles and identification theory reflect a nominalist theory of corporations, which views corporations as nothing more than a collectivity of individuals; that is, the idea that corporations can only act through individuals. On this account, the corporation is simply a name for the collectivity and the idea that the corporation itself can act (or fail to act) and be

blameworthy is a fiction. These accounts regard corporate responsibility as derivative: it must be located through the responsibility of an individual actor. In contrast, realist theories assert that corporations have an existence that is, to some extent, independent of the existence of their members (Belcher 2006). Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault (Colvin 1995). The details of the Royal Commission hearings demonstrate that a realist approach is vital. The criminal legal system needs to develop an account where the responsibility of the organisation is primary: what the organisation did or did not do; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent harm from being caused.

Individualistic response to third party offending: Mandatory reporting

The necessity of developing a realist model is demonstrated in the shortcomings associated with mandatory reporting (and related offences), the pinnacle of the response by the legal system to third party offending in cases of institutional child sexual abuse. In many of the Royal Commission Reports, victims asserted a failure by people in positions of responsibility to respond to child sexual abuse or report it to relevant authorities. Historically third parties could potentially be ascribed responsibility under the common law offence of misprision of a felony (since abolished)⁸ and under the doctrine of complicity (Smith 1991). Currently, offences for third parties revolve around the failure to report and require some form of subjective culpability. All Australian jurisdictions have some form of mandatory reporting offences; these are discussed below. In addition, some states have introduced other offences: for example, New South Wales introduced an offence of ‘concealing a serious indictable offence’ in 1990 that is applicable generally to all serious indictable offences; and in 2014 Victoria created the offence of failure to disclose a child sexual offence.⁹ Ireland introduced an offence in 2012 of withholding of information against children and vulnerable adults. All of these offences require some form of knowledge or belief for ascriptions of culpability. There are problems with this emphasis upon knowledge or belief. As outlined above, the higher up in an organisation, the less likely a person will have any form of knowledge. Moreover, as argued below, the majority of third parties usually lack knowledge or belief that child sexual abuse is occurring or has occurred, and the reason for this lack of knowledge is itself systemic.

Mandatory reporting offences provide a vivid example of difficulties associated with organisational responsibility and the limits of the criminal legal response. Most jurisdictions have requirements that reports must be made (to police or child protection agencies) if a specified person has reasonable grounds to know or believe a child is being sexually abused (Mathews 2014). There are differences across Australian jurisdictions concerning who has to report, what types of maltreatment must be reported and whether criminal or civil, state of mind of the reporter,¹⁰ whether the reporting duty applies to past or currently occurring abuse only and/or to a perceived risk of future abuse. Seven out of the eight jurisdictions have penalties for non-compliance.¹¹

Offences of mandatory reporting can have some applicability to systemic failures (Death 2015).¹² The Victorian State Government inquiries—*Protecting Victoria’s Vulnerable Children Inquiry* (Cummins, Scott and Scales 2012) and *Inquiry into the Handling of Child Abuse by Religious and Other Organisations* (Family and Community Development Committee 2013)—and the current Royal Commission highlight active attempts, particularly by religious organisations, to conceal wrongdoing and protect the organisation:¹³

There has been a substantial body of credible evidence presented to the Inquiry and ultimately concessions made by senior representatives of religious bodies ... that they had taken steps with the direct objective of concealing wrongdoing.

The mandatory reporting offences are appropriate for those who know about the perpetration of child abuse and actively intervene to protect the perpetrator and/or did nothing. There has, however, been reluctance to investigate, charge or prosecute (Gleeson 2016). Prosecutions for failure to report under mandatory reporting duties are very rare, partly because of an emphasis upon encouraging reporting rather than policing it. Mathews (2014) has identified only six prosecutions in the five jurisdictions across Australia with a mandatory reporting regime.

Mandatory reporting offences reflect the criminal justice system's focus on the individual in constructions of culpability, with a preference for requiring some form of subjective blameworthiness. The emphasis upon some kind of subjective element of knowledge, suspicion or belief is ostensibly appropriate. It is in accordance with our understandings of responsibility that one should only be held responsible for what we knew or intended. How could a person or institution possibly be held criminally responsible for what they did not know? However, in many of the Royal Commission Reports, the issue was not that individuals knew or believed that child sexual grooming and/or abuse was occurring, but that they had not recognised the grooming or offending behaviour at all. For example, in Report No. 12, despite eight separate complaints across time about an offending teacher's behaviour, the (former) heads of the preparatory school and headmasters did not place sufficient or correct significance on the concerns raised with them about the offending teacher. All of them gave evidence that they did not receive any guidance or training in detecting or reporting child sexual abuse or grooming behaviour (Royal Commission 2015b: 41). The Royal Commission found:

We are satisfied that the school did not have a dedicated child protection policy until 2004.

We are satisfied that the school's child protection policies that were in force from 2004 until 2009, although compliant with re-registration standards during the period, were deficient when measured against current standards of 'best practice' because:

- they provided insufficient information about how child sexual abuse occurs
- there was no reference to grooming behaviours, no definition of grooming behaviours and
- no instruction on how grooming behaviours might be detected and when they should be reported
- there were no separate guidelines for handling reports of (i) suspected child abuse; and (ii) grooming or inappropriate behaviour by staff that did not involve a specific allegation of child sexual abuse or (after 2009) fell below the threshold for mandatory reporting. (Royal Commission 2015b: 8)

The masters at the school probably could not and would not have been prosecuted for failure to report because they lacked knowledge or belief that child sexual abuse was occurring. But it is this lack of knowledge or belief that is the problem. Their failure to attach sufficient and correct significance to the reports of inappropriate behaviour was due to an organisational failure to adequately train staff to recognise and appropriately report grooming behaviours. The absence of any knowledge or belief was a systemic problem, and the current criminal justice focus on individual, subjective blameworthiness is accordingly inappropriate and misguided.

Conceptualising criminogenic corporate culture

The traditional focus on subjective culpability demonstrated in traditional constructions of corporate liability and mandatory reporting offences is an inadequate response to institutional failure to protect against child sexual abuse. It is necessary to construct a realist approach to organisational failure. However, obstacles confronting a realist approach to organisational culpability are myriad although two dominant streams can be broadly summarised as the pragmatic and the philosophical. The pragmatic stream raises questions about issues such as

offence structures and *how* elements are to be proven. The philosophical challenge is a question of why organisations should be criminalised at all; or whether, alternatively, organisational failure should be best left to the civil sphere. These two challenges are frequently referred to in tandem and yet they are incompatible: the first expresses concern about issues of proof and the difficulties of achieving criminalisation; whilst the second is concerned about over-criminalisation or inappropriate criminalisation of organisations.

The Consultation Paper (Royal Commission 2016a) based on the Sentencing Report (Freiberg et al. 2015) responds in part to the pragmatic question of offence structures by suggesting several different organisational offences. These include being negligently responsible for the commission of child sexual abuse; negligently failing to remove a risk of child sexual abuse; reactive organisational fault; and an offence of institutional child sexual abuse (Freiberg et al. 2015: Ch. 6). The proposed offences have the advantage of adopting a realist perspective and focusing on organisational culpability rather than individual culpability. The negligence offences are the most accessible as they propose including corporate failure into the existing legal doctrine of negligence. It requires the prosecution to establish, firstly, a legal duty; then criminally negligent breach of that duty; and, further, that the breach was a cause of the harm (Ashworth 2013).

The most innovative and challenging offence proposed is that of institutional child sexual abuse:

An organisation commits an offence if:

1. A person associated with the organisation is convicted of an offence of child sexual assault; and
 - (a) the organisation, or a high managerial agent of the organisation, recklessly authorised or permitted the commission of that offence by that person.
2. The means by which such authorisation or permission may be established include proving that the managing body of the institution or a high managerial agent:
 - (a) expressly, tacitly, or impliedly authorised or permitted the commission of the offence; or
 - (b) a corporate culture existed that tolerated or led to the commission of the CSA offence; or
 - (c) failed to create and maintain a corporate culture that would not tolerate or lead to the commission of the CSA offence.

It is a defence to such an offence for the organisation to show that it had adequate corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation; or provided corporate management, control or supervision of the conduct of one or more of the persons associated with the organization. (Consultation Paper 2016a: 248-249)

The offence is a modification of the *Criminal Code Act 1995* (Cth) Part 2.5 and requires that the organisation or a high managerial agent recklessly authorised or permitted the commission of child sexual assault. Such authorisation or permission can be established expressly or through a 'corporate culture' that tolerated or led to the commission of the offence or failure to create or maintain a 'corporate culture' that would not tolerate or would lead to the commission of the child sexual assault. Corporate culture is defined in the Commonwealth *Criminal Code Act 1995* Part 2.5 as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'. The underlying idea of 'corporate culture' is to cover situations where there is a difference between an organisation's formal or written rules and its practices (Clough 2007).¹⁴ An organisation can defend itself on the basis that it is able to show that it had adequate corporate management, control or supervision of the conduct.

Despite being celebrated as ‘arguably the most sophisticated model of corporate criminal liability in the world’ (Clough and Mulhern 2002: 138), the concept of corporate culture has not enjoyed practical success, with very few prosecutions testing the provisions for organisational responsibility in the courts and the (consequent) exclusion of Part 2.5 from operating in other corporate legislation including the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth). Practical issues raised about corporate culture include difficulties of proving the existence of a culture and concern that there may be varying subcultures within an organisation (Beaton-Wells and Fisse 2011). Questions have been raised about *whose* actions or inactions should be included in considering institutional responsibility (Royal Commission 2016a). Concern has also been expressed that an institution’s culture may have changed over time, by which time the circumstances and management that allowed the abuse to occur may have long since changed. It is argued that, in those circumstances, criminal sanctions directed at organisational change would be neither helpful nor necessary (Weissmann and Newman 2007). I argue below that these kinds of practical questions are resolved by the detail of the Royal Commission Reports.

Although corporate culture is regarded as more radical and innovative, the concepts of negligence and corporate culture intersect. Negligence requires a failure to fulfil a legal duty of care, whilst, realistically, in the bulk of cases of institutional child sexual abuse, corporate culture requires the failure to create or maintain a corporate culture that would not tolerate or lead to the commission of child sexual assault. Both negligence and corporate culture are built around the concept of failure. Critics have argued that it is anomalous to hold corporations criminally liable for ‘permitting’ conduct, whether under the concept of corporate culture or negligence, which can be understood as no more than failing to prevent such conduct, when the criminal legal system is generally reluctant to hold individuals liable for omissions.¹⁵ One response to this critique is that, whilst the criminal legal system is reluctant to impose fault for omissions, an accused can, nevertheless, be held liable for omissions for the bulk of criminal offences once a legal duty has been established (Ashworth 2013). All the institutions considered in case studies in the Royal Commission had legal duties to protect the children in their care, and the bulk of them failed long-term to fulfil these duties. Not only does criminal law have a long-held tradition of holding accountable those who failed to act, despite having a legal duty, this idea of culpability due to failure, lack or absence is reflected in classic models of wickedness or blameworthiness (Aristotle 2004; Aquinas 1274[2003]; Midgley 1984/2001; Crofts 2013).

Underlying opposition to corporate liability is fostered by a failure to comprehend the idea of organisational responsibility. This can be seen in one of the concerns articulated by the Consultation Paper:

We know that perpetrators can be found at any level of an institution, including in the most senior leadership positions. It is not clear what adding corporate criminal liability to individual criminal liability would achieve if the former effectively was based on exactly the same conduct as the latter. (Royal Commission 2016a: 251)

This concern reflects a failure to distinguish between the *individual* perpetrator of child sexual abuse and that of the *institution* that allowed, or failed to prevent, identify or respond to, the abuse over long periods of time due to a poor corporate culture. A similar argument was made by Cardinal George Pell, when giving evidence before the Royal Commission. Pell compared the Church to a trucking company running a well-maintained fleet that is not liable for the actions of its workers:

If ... the driver of such a truck picks up some lady and then molests her, I don’t think it’s appropriate – because it is contrary to the policy – for the ownership, the leadership of that company to be held responsible. Similarly with the Church (Royal Commission 2014a: C4509).

This reflects a focus on *individual* liability and the idea that an organisation should not be held liable for the behavior of a rogue employee. However, this disregards the scenario, which emerges in the Royal Commission, where (to continue Pell's metaphor), the truck company has a legal duty to care for 'some lady', and the truck drivers, who are in the employment of the truck company, routinely molest these 'ladies' and are enabled in doing this due to conditions of employment and the absence of training and policies to prevent molestation. This produces a wholly different blame focus, which is increasingly recognised in academic literature, that the corporation is criminogenic: that is, corporations by their nature and culture can produce crime (Apel and Paternoster 2009; Tombs and Whyte 2014; Green and Ward 2004). For example, the United Kingdom Law Reform Commission had considered a similar situation to that proposed by Pell in 1996 and made the following response:

... a truck driver causes death by dangerous driving in the course of his or her employment. This would not, of itself, involve a management failure. If, however, it was found that the death occurred because the driver was over-tired due to the requirement to work excessive hours, this could be due to a management failure for which the company could be liable, assuming that failure fell far short of what would be reasonably expected in the circumstances (United Kingdom Law Reform Commission cited in Clough 2007: 296-297).

The Royal Commission Reports repeatedly detail ongoing failures to prevent child sexual abuse within institutions, demonstrating that the abuse was not a one-off, tragic 'accident' but was due to the corporate culture of the organisation. The Consultation Paper noted that the following situations allow criminal behaviour:

- Situations can provide the opportunity that allows a criminal response to occur. For example, a lack of supervision could provide this opportunity.
- Opportunistic perpetrators are unlikely to actively create opportunities but are likely to recognise and take any that arise.
- Situational perpetrators are unlikely to create or identify opportunities.
- Situations influence criminal behavior.
- Situations present behavioural cues, social pressures and environmental stressors that trigger a criminal response. For example, a sense of emotional congruence with a child might turn into a sexual incident.
- Situational perpetrators are most likely to be influenced by these triggers to commit abuse. (Royal Commission 2016a: 250)

Arguments against organisational responsibility for failure to prevent or respond to child sexual abuse fail to recognise the ways in which the organisation itself is responsible for on-going situations which have allowed or provided opportunities for offending (Palmer and Moore 2016). Good corporate culture can prevent wrongdoing, whilst bad corporate cultures might encourage or fail to discourage some wrongdoing (Gilchrist 2012-2013; Palmer 2012).

Attributing blameworthiness to organisations due to failure—whether through the concept of negligence or corporate culture—is potentially broad and, accordingly, they have been resisted by the corporate world and even by governments that might be held accountable for their negligent acts under such laws (Hogg 2013). As I argue below, the Royal Commission has provided clear examples of cultures in organisations that have failed to prevent institutional child sexual abuse and has also demonstrated common sense approaches as to how a prosecutor might prove a criminal corporate culture (Woolf 1997).

The Royal Commission has provided a myriad of examples of criminal negligence and/or corporate culture tolerating or failing to prevent child sex offending. Report No. 12 (Royal

Commission 2015b) is by no means the worst (or best) example of organisational failure, but it provides a clear example of how and why criminal failure could and should be established. For example, a common problem in institutions is that staff have not been trained to recognise grooming behaviour. In Report No. 12, the staff did not realise they were witnessing grooming behaviour, but still regarded it as sufficiently 'inappropriate' to report it to management. The positive effects of even minimal knowledge of grooming were demonstrated in Report No. 12 by a mother who watched a *Four Corners* national television program called *Unlocking the Demons* (Australian Broadcasting Corporation 2005) which explained how paedophiles groom victims and their families. As a consequence of this program, the mother raised her concerns about the offending teacher with the preparatory school head. She felt that her family may have been 'groomed' by the offending teacher and communicated her concerns about the attention the offending teaching had shown to both her sons. This demonstrates an example of negligence—a failure to meet a duty of care to protect children in their care—and corporate culture—the failure to create a culture that does not tolerate abuse. Teaching staff to recognise and report grooming behavior is a fundamental way to protect against and respond to child sexual abuse.

Not only was there a lack of training of staff about recognising and reporting grooming and child sexual abuse, there was also a culture of bullying so that staff were afraid to report their suspicions. Teachers gave evidence that they were afraid to report not only because their lack of training meant they were not confident that they were dealing with child sexual abuse, but also because they were concerned they would be subjected to rejection, ostracism, bullying and/or harassment from some staff if they were identified as 'whistle blowers'. An example of some of these ramifications includes those experienced by WG who, after she reported the offending teacher to YN, the then head of the preparatory school, WG felt that some of the older male teachers were 'nasty to her'.¹⁶ She communicated the bullying to the new head of the preparatory school, YK, and described an incident where another teacher had tried to run her over. WG said she felt that the new head 'did not want to know about it'. WG said she stopped working at the school because of the way she was treated by her colleagues after reporting the abuse (Royal Commission 2015b: 32). Awareness of the protective culture around the offending teacher was shown in 2004, when the head of school asserted that, if he had dismissed the offending teacher, it would have caused 'division amongst other teachers' (Royal Commission 2015b: 39). Fear of reporting due to lack of knowledge about grooming behavior was exacerbated by the bullying culture. Both ignorance and bullying could and should have been addressed by management and this failure to do so created an environment that facilitated, tolerated and failed to prevent child sex offending. The continuation of the bullying reflects one practical means of establishing a corporate culture by analysing who is rewarded and/or protected by management and who is punished (Woolf 1997).

Despite ignorance and the culture of fear, there were clear reports by multiple teachers of consistently inappropriate behavior by the offending teacher. One teacher wrote:

We are not suggesting anything more serious (as in 'sexual') has occurred. We have no proof of anything like that. However there are several aspects to our concerns. First and foremost is the safety, both physically and emotionally of all children who have come and will come into contact with YJ. Even if what has been outlined in this letter is the total extent of what has occurred, I believe it is still totally unacceptable within any organisation let alone any school and especially our school (Royal Commission 2015b: 23).

In other words, there was sufficient evidence of inappropriate behaviour by the offending teacher to require and justify a response by the school. Despite this the school's response was grossly inadequate. At times the preparatory school master did nothing in response to a complaint except file it. Where there was a response by the preparatory head, this tended to involve a meeting with the offending teacher, who was informed that his behaviour was inappropriate and that he should

modify his own behaviour. Even the teacher's response at these meetings should have raised red flags. For example, in one meeting, he said that 'he had always dealt with students in a tactile manner' (Royal Commission 2015b: 22). The headmaster of the school resolved to keep the offender under closer supervision and scrutiny, but did not do this. Management wrote formal letters of warning, but the teacher refused to acknowledge or sign these. After the third and 'final warning', the headmaster then sent another 'final warning'. This response by management was inadequate and inappropriate. It gave a message to the offender and also the staff that there were no repercussions for grooming behaviour. This discouraged staff from reporting offending behaviour and encouraged the offender to continue. The failure by the headmasters to respond appropriately was partly due to a lack of training and policies.¹⁷ This was exacerbated by a failure to report concerns to the police, child protection officers or anyone who had experience in the protection of children. Reports of the offending teacher's behaviour to any of these experts would likely have prevented a continuation of his overt grooming behaviour. The school needed to have developed clear written policies on how to detect child abuse of grooming behaviours, the procedures for reporting child abuse or grooming behaviours, handling complaints, expert training for staff on detecting and reporting child abuse and grooming behaviour, and an environment which is conducive to staff, parents and students reporting concerns (Royal Commission 2015b: 10). This aspect of Report No. 12 goes toward addressing the question of how prosecutors will differentiate between cultures and subcultures. It is apparent from Report No. 12 that the dominant culture, supported by managerial staff, failed to prevent and/or react appropriately to child sexual abuse. Individual staff members spoke out against the offender and the culture but they were acting as individuals rather than a competing subculture.

Report No. 12, along with other Royal Commission reports, highlights systemic problems that go beyond the organisations. This reflects Hogg's (2013) argument that the state may refrain from introducing organisational law reforms because they have the potential to impact not only upon powerful institutions but also on the state itself. For example, in Report No. 12, one of the reasons why the school had not ensured that appropriate procedures were enforced was due to the registration process undertaken by independent schools in Western Australia. Despite complaints on file about the offending teacher dating from 1999 onwards, the school was approved for registration in 2004 until 2010. The registration report stated that the school had developed and implemented a child protection policy and that its documented policies and procedures were of a very high standard (Royal Commission 2015b: 15). The registration standards had not incorporated the concept of grooming behaviors. Nor were there clear standards regarding the reporting of allegations of child sexual abuse. The Western Australian registration standards did not clearly articulate the current standards or benchmarks to child protection policies and procedures against which best practice is assessed and a school registered (Royal Commission 2015b: 16). There were two major shortcomings associated with the registration process. The first was the approval of inadequate policies. The second was the focus of the registration process upon (abstract) policies rather than the culture and practices of the school. This absence of adequate and appropriate regulatory standards may reflect and reinforce the difficulties of imposing organisational liability. The systemic, cultural problems went beyond the school, to the state and national levels of regulation and enforcement, a problem not isolated to Report No. 12 or to Western Australia (Mathews 2017).

Report No 12 demonstrates how corporate culture tolerated or led to the commission of child sexual offences and failed to create or maintain a corporate culture that would not tolerate or lead to the commission of child sex offences. Overall, the Royal Commission concluded that, taken together, the history of events indicates 'a serious systemic failure to protect children in the care of the School'(Royal Commission 2015b: 40-41). Organisations involved in the care of children have existing statutory and common law duties of care. Negligence requires a breach of that duty of care whilst corporate culture requires toleration or the failure to create or maintain a culture that would not tolerate or lead to the commission the child sexual assault. Standards provide a measure against which to compare the procedures and actions of an institution against a

'reasonable' institution. It is essential to articulate appropriate standards of care and then measure organisations against these standards. In response to general shortcomings in state and national standards, the Royal Commission has developed, articulated and clarified the national principles for child safe institutions that should be required of individuals and organisations involved in the care of children (Royal Commission 2016b; Valentine et al. 2016). Of the ten principles developed by the Royal Commission, the bulk focus on the development of institutional governance and policies. Based on the Royal Commission findings, it should not be that difficult to develop a national standard of care that is applicable and enforced across states. Interestingly, whilst the Royal Commission recognises that a key issue to creating child safe institutions is 'holding institutions to account through independent oversight and monitoring' (Royal Commission 2016b: 2), at the moment, this is only implicit in the ten principles rather than expressly articulated. Regardless of whether an institutional criminal offence is created based on negligence or corporate culture, the terms of the offence address fears of over-criminalisation. In order to be successfully prosecuted, the failure to meet 'reasonable standards' must be sufficiently negligent to justify the imposition of criminal sanctions. One-off or isolated failures will not be sufficient to justify attributions of criminal blameworthiness. If all reasonable measures had already been employed to stop child sex offending, then the goals of the criminal law in relation to the organisation would have already been met and the organisation would not be prosecuted. The case studies in the Royal Commission provide examples of long-term systemic failures by institutions. Organisations which provide care of children must establish cultures in which prevention of child sexual abuse is accepted as an ordinary responsibility of all adults and the organisation. Failure to do so means that the corporation is criminogenic and can and should be prosecuted.

The idea of failure underlying organisational culpability can assist in developing appropriate parameters in terms of prosecution and punishment. For example, in the United Kingdom, the *Bribery Act 2010* (UK) specifies that an organisation will be guilty of corporate failure to prevent offences of bribery unless it can prove that it had adequate procedures to prevent the conduct (Wells 2014). The Act then details six principles based on the Organisation for Economic Co-operation and Development (OECD) guidelines on compliance (OECD 2010) that comprise proportionate procedures, top-level commitment, risk assessment, due diligence, communication (and training), and monitoring and review.¹⁸ These principles of compliance could be developed to determine whether there was commitment by an organisation to a culture to the prevention of child sexual abuse. This would also circumvent concerns about prosecuting an organisation for past failures from which it had since reformed. Moreover, in the Australian and international context, increasing reliance is placed upon 'deferred prosecutions' or remedies such as 'compliance programs' or 'enforceable undertakings' to use the threat of criminal legal prosecutions and/or sanctions to compel corporations to comply with existing regulatory standards (Belcher 2006; Parker 2004). This provides an incentive to management to undertake responsive organisational change (Fisse and Braithwaite 1993; Weissmann and Newman 2007).

Conclusion

Systemic failure extends beyond the types of institutions investigated by the Australian Royal Commission to legal institutions. The enforcement of regulatory laws has not always been vigorous and there have been no prosecutions of any organisations investigated by the Royal Commission. This reflects opposition by corporations generally to the notion of collective responsibility (Wells 2001, 2010). One key argument to justify criminalisation of collective wrongdoing is to emphasise the expressive power and role of the criminal law (Gilchrist 2012-2013). The criminal legal system explicitly and implicitly organises and depicts conceptions of wrongfulness or badness as part of its system of blaming, in addressing the core issue of what is required to be sufficiently culpable to justify the attribution of criminality and the application of sanctions. The law routinely classifies conduct, defines action, interprets events and evaluates worth; it then sanctions these judgments with the force and authority of law (Crofts 2013).

Criminal liability carries 'a formal and solemn pronouncement of the moral condemnation of the community' (Hart Jr 1958). Conviction carries with it serious consequences and social stigma. It expresses condemnation: it is not about just wearing a penalty for breaking the law but opprobrium. This expressive aspect of the law has value (Garland 1990). Moreover, it has been suggested by theorists that criminalising corporate conduct/failures has specific expressive value: '[d]eterring inefficient conduct is one socially desired objective, but repudiating the false valuations embodied in corporate wrongdoing is another' (Kahan 1998). Accordingly, the fact of condemnation is itself significant.

The law asserts models of right and wrong, good and bad, and this assertion is enforced with the imposition of sanctions. Theorists have recognised and argued that the form of the law will affect, reflect and reinforce perceptions of the morality of a particular practice or behaviour.¹⁹ The Royal Commission Consultation Paper is similarly premised on 'the importance of seeking and obtaining a criminal justice response to any child sexual abuse in an institutional context' (Royal Commission 2016a: Ch. 2). The symbolic, expressive power of the law is important, which is why it is disappointing that there was not more focus on collective culpability in the Consultation Paper. Reforming the criminal law in this area proffers an opportunity to reframe our notions of culpability. It is not an unfortunate accident or bad luck that offenders have been able to offend with impunity across months and years in specific institutions (Death 2015). The Royal Commission hearings have provided repetitive and remarkably consistent examples of the ways in which specific organisations tolerated, facilitated or failed to prevent child sexual abuse, and these organisations can and should be regarded as criminogenic.

The failure to prosecute or conceptualise harms caused by corporations as culpable has its own symbolism. It suggests that 'corporations may violate criminal laws if they are willing to pay for it. Corporate crime would thus be little more than a menu of harms and prices' (Gilchrist 2012-2013). There is currently a disjunction between community responses to organisational failure and the response of the law. It is not simply a matter of a legal demand for culpability for a criminal conviction that did not adequately meet moral condemnation. But the structure of the criminal law has prevented any inquiry whatsoever into the ways in which the corporate organisation is at fault for facilitating, tolerating, or failing to prevent child sex offending. We need imagination and creativity to develop and structure notions of collective liability that adequately reflect and reinforce the fault and responsibility of organisations for crime.

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¹ Many thanks to Yolanda Thomas for her excellent research assistance.

² For further information refer to the Royal Commission website: <https://www.childabuseroyalcommission.gov.au/>.

³ The United Kingdom is currently undertaking an Independent Inquiry into Child Sexual Abuse (see <https://www.iicsa.org.uk/>).

⁴ The *Herald of Free Enterprise* was a ferry that capsized soon after leaving the Belgian port of Zeebrugge in 1987. The official inquiry found the sinking was caused by a failure to close the bow doors and the failure to check if the doors were closed. The Southall rail crash occurred in 1997 at Southall after a high-speed train failed to stop at a red signal and collided with a freight train crossing its path. The incident resulted in seven deaths and 139 injuries.

⁵ These general principles have been adopted in Australia (see *Hamilton v Whitehead* 166 CLR 121, 127).

⁶ For examples of judicial criticisms of identification theory, see Lord Hoffman, Privy Council in *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 3 All ER 918; Justice Estey, *Canadian Dredge & Dock Co v R* [1985] 1 SCR 662 at 693. Dr Paterson's role as Headmaster at Knox Grammar School provides an example where identification theory would work. Power and knowledge were centralised in Dr Paterson. He knew about allegations of child sexual abuse ranging across time at Knox Grammar and chose not report these allegations to regulators or

- the police. When police were investigating one report, he did not apprise the officer of other reports that he knew were relevant (Royal Commission 2016c)
- ⁷ The experience of staff at the school in Report No. 12 (Royal Commission 2015b) was different from other organisations. At that school the staff communicated with each other about their concerns. In contrast, according to Report No. 6 (Royal Commission 2015a), staff did not communicate their concerns with each other as much, and the lack of systemic understanding of the complaints was due in part to staff expressing their concerns to different members of upper management who then did not inform each other (Crofts 2016).
- ⁸ NSW has created the offence of concealing a serious indictable offence under s 316 *Crimes Act 1900* (NSW). This offence has been used to prosecute the concealment of serious crimes such as murder and manslaughter, but has rarely been used to prosecute concealment of child sexual abuse offences. In 2014, Victoria has created the offence of failure to disclose a child sexual offence under s 327(2) of the *Crimes Act 1958* (Vic). The Royal Commission received evidence that, as of April 2016, there were three matters of failing to report that had been recorded since the offence commenced (Royal Commission 2016a: 231).
- ⁹ Only three priests have been charged with the offence of concealing sex offences in Australia.
- ¹⁰ In four jurisdictions the reporter must have a 'belief on reasonable grounds', and in four other jurisdictions the reporter 'suspects on reasonable grounds'.
- ¹¹ For example, the Australian Capital Territory currently imposes a maximum penalty of \$5,500 and/or imprisonment for a maximum of 6 months (*Children and Young People Act 2008* (ACT)). The Northern Territory imposes a \$26,000 penalty (*Care and Protection of Children Act 2007* (NT)). Victoria previously imposed a penalty of \$1408 (*Children, Youth and Families Act 2005* (Vic)). NSW originally provided a penalty but this was omitted after the Wood Inquiry recommendations and legislation in 2009 (*Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13* (NSW)).
- ¹² Although, as I argue below, whether civil or criminal, there appears to be lack of enforcement of these offences. See, for example, the 'Cummins Inquiry', the *Report of the Protecting Victoria's Vulnerable Children Inquiry* (Cummins et al. 2012), which noted the lack of application and enforcement of the existing 'Offence to fail to protect child from harm' (*Children, Youth and Families Act 2005* (Vic) s 493).
- ¹³ In regard to the Catholic Church specifically, the Family and Community Development Committee (2013) found that rather than being instrumental in exposing the criminal abuse of children and the extent of the problem, senior leaders of the Church:
- Trivialised the problem
 - Contributed to abuse not being disclosed or not being responded to at all prior to the 1990s
 - Ensured that the Victorian community remained uninformed of the abuse
 - Ensured that the perpetrators were not held accountable, with the tragic result being that children continued to be abused by some religious personnel when it could have been avoided. (Family and Community Development Committee 2013: xxxi).
- The Royal Commission (2016c) provides an example where the former Headmaster Dr Ian Paterson would have been appropriately charged with mandatory reporting offences. However, the Case Study also provides an example of systemic failure to educate teachers to recognize and report grooming behaviours.
- ¹⁴ This article focuses on institutional failure to respond to child sexual abuse. Palmer et al. (2016) have also undertaken analysis of the culture of 'total institutions' and how these may militate against reporting and preventing child sexual abuse in institutions.
- ¹⁵ Evidence of Hon Chief Justice Gleeson, excerpted in Senate Legal and Constitutional Legislation Committee (c. 1994: 31). For an analysis of responsibility for omissions in criminal legal doctrine, see Ashworth (2013).
- ¹⁶ The Royal Commission uses initials to protect anonymity of individuals who give evidence before the Royal Commission.
- ¹⁷ In contrast, in the YMCA there were too many policies and principles. Staff did not know about the policies and they were not enforced by management.
- ¹⁸ See also the United States Sentencing Commission (2004: Ch. 8B2.1) which details the criteria that should be used to judge a corporate compliance program.
- ¹⁹ For example, both Duster (1970) and Manderson (1993) have undertaken analysis of drug laws in different jurisdictions and have argued that a change in the legal status of drug laws leads people to think of an activity as immoral even though they had not thought so previously. Immoral connotations in relation to illicit drugs developed through a process of social stigmatisation of drug users, by shifting from regulation by the free market to doctors and then to police and criminal justice agencies. The intersection of law and morality has also been argued in relation to the production of sexual identities. See, for example, Crofts (2010); Stychin (1995).

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