SUBMISSION TO THE ROYAL COMMISSION CRIMINAL JUSTICE CONSULTATION PAPER

ASSOCIATE PROFESSOR PENNY CROFTS
Faculty of Law, University of Technology Sydney
Penny.crofts@uts.edu.au

ORGANISATIONAL IR/RESPONSIBILITY

The ongoing Australian Royal Commission into Institutional Responses to Child Sexual Abuse 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 collective, systemic failures to prevent and/or adequately respond to child sexual abuse. There is a disjunction between the condemnation articulated by the Royal Commission in response to systemic failures and the criminal legal position of these companies. There has, in fact, been no criminal justice response whatsoever to these collective failures (Crofts, 2016). This mirrors concerns articulated generally in academic literature about the disjunction between the moral condemnation of organisations and the legal position of these companies (Colvin, 1995).
This submission argues that organisations should have some criminal liability for the creation, management and response to risk when it has materialised in harm to a child and endorses the creation of a new offence criminalising institutional child sexual abuse.

THE IMPORTANCE OF SEEKING AND OBTAINING A CRIMINAL JUSTICE RESPONSE

Corporate criminal responsibility 'is often tolerated rather than encouraged' (Wells, 2014). Corporate criminal law has emerged on a case by case and more recently statute by statute basis with a consequent lack of general principles (with a notable exception of the Model Criminal Code discussed below). The principles of criminal law were developed prior to industrialisation and corporatisation, with a limited conceptual vocabulary that has not mapped easily onto business corporations. In particular, the general principles of criminal law have been 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). The Royal Commission has provided an incredible amount of detail about systemic failure, its impacts upon child sex offending and reactions by the institution, and highlights the need for offences at an organisational level. 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 188 people on the *Herald of Free Enterprise* in 1987 and the Southall rail crash in September 1997. The Royal Commission offers an opportunity to address the unsatisfactory criminal justice response to organisational wrongdoing.

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 entitled *Criminal Justice* (Abuse, 2016). The central focus of the Royal Commission is indicated in its title – *Institutional* 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' (Letters Patent, 2013: Para (m)(ii)). However, the *Criminal Justice Consultation Paper* suggests that despite all the details in the Reports, the Royal Commission's focus has remained primarily on individual responsibility, specifically the

criminalisation of child sexual abusers, improving the response of the criminal justice system to individuals, and mandatory reporting. This submission does not suggest that these reforms are not important. But what is disappointing is the very small amount of time that has been devoted to the conceptually challenging area of collective liability. Of the almost 800 page document, only 10 pages, or part of one chapter of the 15 is focused on criminal justice responses to institutional failings. The bulk of analysis regarding systemic or collective wrongdoing is actually in a separate report – *Sentencing for Child Sexual Abuse in Institutional Contexts* (Freiberg et al., 2015). Arguably the authors' focus on criminalising collective wrongdoing was beyond the terms of the brief of that report as no organisations have been punished for collective wrongdoing. However, the authors justify their approach in a Chapter entitled '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). The arguments detailed in the *Sentencing Report* are then referred to in the *Criminal Justice Consultation Paper.* There needs to be appropriate time and space given to considering legislative reforms in this area that has historically proven challenging for the criminal law.

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:

> Deterring 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 recognized and argued that the form of the law will affect, reflect and reinforce perceptions of the morality of a particular practice or behaviour.[i] The Royal Commission *Criminal Justice 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' (*Criminal Justice* chapter 2). The symbolic, expressive power of the criminal law, accompanied by coercive sanctions is very important – which is why it is so disappointing that there was not more focus on collective culpability in the *Criminal Justice Consultation Paper*. The failure to prosecute corporations for causing harms presents its own symbolism. It suggests that corporations may violate criminal laws with impunity, provided they are willing to pay for it. 'Corporate crime would thus be little more than a menu of harms and prices' (Gilchrist, 2012-2013). The general public do not believe that corporations should be able to inflict harm provided they are willing to pay for it, and law reforms need to be instituted to ensure that corporations are held responsible for failures.

MANDATORY REPORTING

In terms of culpability of people and/or institutions who did not perpetrate abuse the pinnacle of the criminal justice response to this point has been mandatory reporting. Most jurisdictions have provisions requiring 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, whether the reporting duty applies to past or currently occurring abuse only, or also to a perceived risk of future abuse. Seven out of the eight jurisdictions have penalties for non-compliance.

Mandatory reporting laws tend to draw on the capacity of professionals who typically deal with children in the course of their work and who encounter cases of serious child abuse and neglect to report these situations to helping agencies. The aims are to protect the child from significant harm and decrease the likelihood of recurrence. Mandatory reporting laws help identify cases of child sexual abuse which would otherwise not be revealed, enable detection of the offender and offer an opportunity to provide medical and other therapeutic assistance to the abused child and her or his family. The efficacy of the laws have been both criticised (Ainsworth, 2002, Ainsworth and Hanson, 2006) and defended (Besherov, 2005, Finkelhor, 1990, Finkelhor, 2005, Mathews, 2012, Mathews and Bross, 2008).

Offences of mandatory reporting can have some applicability to systemic failures. The Victorian Inquiries and the current Royal Commission highlight active attempts, particularly by religious organisations, to conceal wrongdoing and protect the organisation:

> 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 recent Royal Commission hearing into Yeshiva Melbourne and Yeshiva Brisbane is illuminating similar practices of failing to protect children despite knowing and/or suspecting child abuse was occurring. 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. The Criminal Justice Consultation Report asserts that mandatory reporting offences raise 'the difficult issues of whether what could fairly easily be identified as a moral duty … should become a legal obligation, breach of which would be punishable under the criminal law.' I disagree. Such a legal duty has been imposed by the majority of jurisdictions in Australia and can be justified by the harmful consequences of failing to report.

I support the creation of an offence targeting institutional child sexual abuse offences and requiring those within institutions with the relevant knowledge or belief to report to police.

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 we can only be 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. This is where the importance of an account of collective or organisational wrongdoing becomes essential. Please see my analysis of the ways in which

organisational structures undermined the likelihood of any knowledge or recognition of sex offending in institutions studied by the Royal Commission: (Crofts, 2016).

OFFENCES BY INSTITUTIONS

Institutional offences are absolutely essential in addition to offences for failure to protect or report. The Royal Commission Reports provide overwhelming repetition of examples of collective failures. The individual failures may have been minor, but collectively they have facilitated or failed to prevent sex offending. Moreover, collective failures provide a sufficient foundation for attributions of blameworthiness. Individuals may not have been adequately trained to recognise grooming or child abuse, reporting procedures may not have been known or understood, and procedures in terms of recruitment, employment and duties may not have been followed. The details of the Royal Commission Reports require and justify a response to collective failures.

Nominalist theories of corporate personality view corporations as nothing more than collectivities of individuals. The corporation is a simply a name for the collectivity and the idea that the corporation itself can act and be blameworthy is a fiction. Corporate responsibility is derivative – 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 existences of their members. 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). Responsibility of the corporation is primary – what corporation did/not do; what it knew or ought to have known about its conduct; what it did or ought to have done to prevent harm from being caused. The Royal Commission Reports have highlighted that the realist approach is essential to the construction of organisational liability. The Royal Commission offers an opportunity for radical law reform, radical proposals for law reform dispensing with any necessary connection between corporate and individual liability: 'the aim is to construct a scheme of liability for the *organisational* conduct and fault of the corporation, regardless of whether or not any individual would have committed an offence.' (Colvin, 1995)

As recommended in Freiberg et al *Sentencing Report* (Freiberg et al., 2015) new offences could draw upon Part 2.5 of the *Criminal Code* 1995 (Cth). Most significant are parts (c) and (d) which focus on 'corporate culture'. Whilst 'corporate culture' has been criticised as too vague and failing to recognise sub-cultures – corporate culture is a valuable means by which to analyse the disjunction between corporate formal procedures and policies and its practices and where those practices resulted in non-compliance with the law:

> Different corporations exhibit different cultures, and these cultures exercise influence over individual corporate agents. Good corporate cultures can prevent some wrongdoing, and bad corporate cultures can encourage or at least fail to discourage some wrongdoing (Gilchrist, 2012-2013).

The Royal Commission Reports provide ongoing examples of the ways in which corporate culture resulted in the failure of staff, middle management and executives to appropriately prevent and/or respond to child sexual abuse.

A positive defence should rest upon the corporation to establish that it had an appropriate corporate culture to prevent child sex offending. This could be modelled on the *Bribery Act 2010 UK.* A corporation will be guilty unless it can prove on the balance of probabilities that it had in place adequate procedures to prevent the conduct (the bribe in question):

> The underlying aim appears to be to reassure business that it will not be at risk of prosecution for isolated examples of bribery so long as it can show top-level commitment to preventing bribery, and has undertaken risk assessments, training and monitoring. (Wells, 2014)

The OECD provides six principles of compliance – proportionate procedures; top-level commitment, risk assessment, due diligence, communicating (and training), and monitoring and review. Each is explained in detail with illustrative case studies (OECD, 2010). Similar principles of compliance could be articulated in relation to institutional child sex abuse offence.

SANCTIONS

Corporate reforms cannot and should not be separated from sanctions. One approach that has proven highly successful in the USA has been deferred prosecutions (Weissmann and Newman, 2007). Post-Enron there has been a dramatic rise of deferred prosecution agreements with corporations:

> A deferred prosecution agreement is, in essence, a form of probation which enables a corporation to avoid pleading guilty to a crime or even being indicted. Under such an agreement, the company commits to performing certain agreed-upon measures and refraining from criminal conduct for the duration of the agreement's term, at the end of which if the company has complied with all the terms, the government drops all charges. (Weissmann and Newman, 2007)

This approach encourages corporate reforms regarding internal compliance measures that can best prevent and detect crimes engaged in by company employees. The focus in the USA has been upon corporate fraud and bribery. However, the idea of deferred prosecutions could usefully be applied to any organisation involved in the care of children – including volunteer organisations. These deferred prosecutions are basically requiring organisations to follow the law. If they fail to follow the existing child protection legislation then they can and should be prosecuted. The costs of the compliance program should be paid by the organisation. These agreements can also provide templates for organisations seeking to implement internal mechanisms that will satisfy law enforcement.

CONCLUSION

There is a yawning chasm between the moral condemnation of organisational failures articulated in the Royal Commission Reports and law's response to these failures. It is not simply a matter of the law's having demanded worse culpability for a criminal conviction than for moral condemnation. The structure of the law of corporate criminal liability has prevented any inquiry into aspects of corporate organisation that formed the basis of the moral condemnation. It is vital that adequate attention and time be addressed to constructing an appropriate criminal justice response to organisational failures in preventing and responding to child sexual abuse within institutions.

ABUSE, R. C. I. I. R. T. C. S. 2016. Consultation Paper: Criminal Justice. Australia: Commonwalth of Australia.

AINSWORTH, F. 2002. Mandatory Reporting of Child Abuse and NEglect: Does it really make a difference? *Child and Family Social Work,* 7**,** 57.

AINSWORTH, F. & HANSON, P. 2006. Five tumultuous years in Australian child protection: Little progress. *Child and Family Social Work,* 11**,** 33-41.

BESHEROV, D. 2005. Overreporting and underreporting of child abuse and neglect are twin problems. *In:* LOSEKE, D., GELLES, R. & CAVANAUGH, M. (eds.) *Current controversies on family violence.* Thousand Oaks: Sage.

COLVIN, E. 1995. Corporate Personality and Criminal Liability. *Criminal Law Forum,* 6**,** 1-44.

CROFTS, P. 2010. Brothels: Outlaws or Citizens? *International Journal of Law in Context,* 6**,** 151-166.

CROFTS, P. 2013. *Wickedness and Crime: Laws of homicide and malice,* London and New York, Routledge.

CROFTS, P. 2016. Legal irresponsibility and institutional responses to child sex abuse. *Law in Context,* 34**,** 79-99.

DUSTER, T. 1970. *The Legislation of Morality*.

FINKELHOR, D. 1990. Is child abuse overreported? *Public Welfare,* 48**,** 22-29.

FINKELHOR, D. 2005. The main problem is underreporting child abuse and neglect. *In:* LOSEKE, D., GELLES, R. & CAVANAUGH, M. (eds.) *Current controversies on family violence.* Thousand Oaks: Sage.

FREIBERG, A., DONNELLY, H. & GELB, K. 2015. Sentencing for Child Sexual Abuse in Institutional Contexts. Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse.

GARLAND, D. 1990. *Punishment and Modern Society,* Oxford, Clarendon Press.

GILCHRIST, G. 2012-2013. The expressive cost of corporate immunity. *Hastings Law Journal,* 64**,** 1-56.

HART JR, H. M. 1958. The Aims of the Criminal Law. *Law and Contemporary Problems,* 23**,** 401.

KAHAN, D. 1998. Social Meaning and the Economic Analysis of Crime. *Journal of Legal Studies,* 27**,** 609.

MANDERSON, D. 1993. *From Mr Sin to Mr Big,* Melbourne, Melbourne University Press.

MATHEWS, B. 2012. Exploring the contested role of mandatory reporting laws in the identification of severe child abuse and neglect. *In:* FREEMAN, M. (ed.) *Current Legal Issues: Law and childhood studies.* Oxford: Oxford University Press.

MATHEWS, B. 2014. Mandatory reporting laws for child sexual abuse in Australia: A legislative history. Canberra: Royal Commission into Institutional Responses to Child Sexual Abuse.

MATHEWS, B. & BROSS, D. 2008. Mandatory reporting is still a policy with reason: Empirical evidence and philosophical grounds. *Child Abuse and Neglect,* 32**,** 511-516.

OECD 2010. Good practice guidance on internal controls, ethics and compliance.

STYCHIN, C. 1995. *Law's Desire: Sexuality and the Limits of Justice,* London, Routledge.

WEISSMANN, A. & NEWMAN, D. 2007. Rethinking Criminal Corporate Liability. *Indiana Law Journal,* 82**,** 411-451.

WELLS, C. 2014. Corporate Responsibility and Compliance Programs in the United Kingdom. *In:* MANACORDA, S. (ed.) *Preventing Corporate Corruption.* Switzerland: Springer International Publishing.

---

[i] For example, Duster and Manderson 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. DUSTER, T. 1970. *The Legislation of Morality*, MANDERSON, D. 1993. *From Mr Sin to Mr Big,* Melbourne, Melbourne University Press. The intersection of law and morality has also been argued in relation to the production of sexual identities. See, for example, CROFTS, P. 2010.

Brothels: Outlaws or Citizens? *International Journal of Law in Context,* 6**,** 151-166, STYCHIN, C. 1995. *Law's Desire: Sexuality and the Limits of Justice,* London, Routledge.